

No. 14755

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United States  
Court of Appeals  
for the Ninth Circuit

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RECONSTRUCTION FINANCE CORPORATION, a corporation, Appellant,

vs.

SULLIVAN MINING COMPANY, a corporation, Appellee.

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Transcript of Record

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Appeal from the United States District Court for the District  
of Idaho, Northern Division

FILED

JUL 20 1955

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Appellee.



In the District Court of the United States for the  
District of Idaho, Northern Division

No. 1868

SULLIVAN MINING COMPANY, a Corporation,  
Plaintiff,

vs.

RECONSTRUCTION FINANCE CORPORA-  
TION, a Corporation, Defendant.

### COMPLAINT

Plaintiff for cause of action alleges:

#### I.

That at all of the times hereinafter mentioned the plaintiff has been and is now a corporation organized and existing under the laws of the State of Idaho, and engaged in the business, among other things, of purchasing, and processing at its smelter at Silver King, Shoshone County, Idaho, zinc concentrates produced from ores mined in said Shoshone County and elsewhere.

#### II.

That at all of the times hereinafter mentioned the defendant has been and is now a corporation created by an Act of the Congress of the United States of America, the capital stock of which said corporation is wholly owned by the United States Government.

## III.

The jurisdiction of this Court is based upon the provisions of 15 U.S.C.A., Section 603 (a).

## IV.

Metals Reserve Company was created by an Act of Congress on or about June 28, 1940, and thereafter continued to exist as an agency of the United States Government until it was duly and regularly dissolved on or about June 30, 1945, as hereinafter set out.

## V.

On or about June 18, 1942, plaintiff entered into a contract in writing with said Metals Reserve Company in and by which it was provided and agreed, among other things, that plaintiff, as agent for said Metals Reserve Company, should purchase for the account of said Metals Reserve Company zinc concentrates in specified monthly quantities, the purchase price of said concentrates to be paid by Metals Reserve Company; that said concentrates so purchased should be stockpiled by the plaintiff at its expense and should thereafter be sold by said Metals Reserve Company to the plaintiff from time to time as the plaintiff should be able to process the same at its said smelter.

## VI.

That a modification of said contract was thereafter, to-wit, on August 9, 1944, approved in writing by plaintiff and said Metals Reserve Company providing that said Metals Reserve Company should



have the right at its sole option to remove all or any part of the zinc concentrates purchased and stockpiled by the plaintiff for the account of Metals Reserve Company, the plaintiff, however, to be then reimbursed for actual out-of-pocket expense incurred by the plaintiff in connection with the concentrates so stockpiled and then removed by Metals Reserve Company.

#### VII.

Metals Reserve Company was dissolved by an Act of Congress, dated June 30, 1945, 15 U.S.C.A., Section 611, and by said Act all of its functions, commitments and liabilities were transferred to and assumed by defendant, Reconstruction Finance Corporation.

#### VIII.

That between August 9, 1944, the date of said contract modification, and December 1, 1948, said Metals Reserve Company and Reconstruction Finance Corporation removed 19,224.06 tons of said zinc concentrates stockpiled by the plaintiff upon which the plaintiff had incurred actual out-of-pocket expense in the sum of \$14,595.39, and subsequent to December 1, 1948, the defendant, Reconstruction Finance Corporation, removed or caused to be removed 53,039.58 tons of such stockpiled concentrates upon which the plaintiff had incurred actual out-of-pocket expense in the sum of \$40,268.71.

That plaintiff has heretofore made demand upon the defendant for the payment of said sums, but that neither all nor any part thereof has been paid,

and plaintiff alleges that said sums, amounting in the aggregate to the sum of \$54,864.10, together with interest thereon at the rate of 6% per annum from October 12, 1948, is now due and owing from defendant to the plaintiff.

Wherefore, plaintiff prays judgment against defendant for the sum of \$54,864.10, together with interest thereon at the rate of 6% per annum from October 12, 1948, and for plaintiff's costs incurred herein.

/s/ CHAS. E. HORNING,  
BROWN & PEACOCK,  
/s/ By ROBERT E. BROWN,  
Attorneys for Plaintiff

Duly Verified.

[Endorsed]: Filed July 10, 1952.

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[Title of District Court and Cause.]

### SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Chas. E. Horning, Wallace, Idaho; and Brown & Peacock, Kellogg, Idaho, plaintiff's attorneys, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: July 10, 1952.

[Seal]

ED. M. BRYAN,

Clerk of Court

/s/ By LONA MAUSER,

Deputy Clerk

Return on Service of Writ attached.

[Endorsed]: Filed August 1, 1952.

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[Title of District Court and Cause.]

### MOTION TO DISMISS

Comes now the Defendant, Reconstruction Finance Corporation, by their attorneys, Stimson & Donahue, and moves the Court as follows:

1. To dismiss the action because the Complaint fails to state a claim against Defendant upon which relief can be granted.

2. For the reason that the United States of America is an indispensable party defendant.

/s/ STIMSON & DONAHUE,

Attorneys for Defendant Reconstruction Finance Corporation

Acknowledgment of Service attached.

[Endorsed]: Filed October 9, 1952.

[Title of District Court and Cause.]

## MINUTES OF THE COURT

November 5, 1952

This cause came on regularly this date in open Court for hearing on Defendant's motion to dismiss.

Stimson and Donahue representing the Defendant and Chas. E. Horning and Robert Brown representing the Plaintiff. At this time Counsel for the Defendant confessed his motion with out merit. Therefore the Motion was ordered stricken and the Defendant given 60 days to answer.

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[Title of District Court and Cause.]

## ANSWER AND AFFIRMATIVE DEFENSE

Comes now the Defendant, Reconstruction Finance Corporation, and in answer to the Complaint of Plaintiff, admits, alleges and denies as follows:

### I.

Defendant admits Paragraphs I, II, III, IV, and V of Plaintiff's Complaint.

### II.

Answering Paragraph VI of Plaintiff's Complaint, this answering Defendant admits: "That a modification of said contract was thereafter, to-wit, on August 9, 1944, approved in writing by Plaintiff and said Metals Reserve Company providing

that said Metals Reserve Company should have the right at its sole option to remove all or any part of the zinc concentrates purchased and stockpiled by the Plaintiff for the account of Metals Reserve Company," and this answering Defendant denies all other matters contained in said paragraph.

### III.

Answering Paragraph VII of Plaintiff's Complaint, this answering Defendant admits the same.

### IV.

Answering Paragraph VIII of Plaintiff's Complaint, this answering Defendant admits that between August 9, 1944, the date of said contract modification, and December 1, 1948, said Metals Reserve Company and Reconstruction Finance Corporation removed 19,224.06 tons of said zinc concentrates stockpiled by the Plaintiff, but this Defendant denies that Plaintiff had incurred actual out-of-pocket expense in the sum of \$14,595.39 in connection therewith, and this answering Defendant specifically denies that it at any time agreed to reimburse Plaintiff for such out-of-pocket expense. Further answering said paragraph, this answering Defendant denies that subsequent to December 1, 1948, the defendant, Reconstruction Finance Corporation, removed or caused to be removed 53,039.58 tons of such stockpiled concentrates, upon which the Plaintiff claims to have incurred an additional out-of-pocket expense in the sum of \$40,268.71. Further answering said paragraph, this answering Defendant admits that the Plaintiff has made demand upon



it for payment in the sum of \$14,595.39, and that neither all nor any part thereof has been paid, but Defendant denies that demand has been made upon Reconstruction Finance Corporation for the further sum of \$40,268.71, representing the alleged cost of removal of 53,039.58 tons of stockpiled concentrates, and this answering Defendant specifically denies that there is any sum now due and owing from the Defendant to the Plaintiff.

Further answering said Complaint and as an Affirmative Defense thereto, this answering Defendant, Reconstruction Finance Corporation, alleges as follows:

I.

Metals Reserve Company entered into a letter agreement with Sullivan Mining Company dated June 18, 1942, covering the purchase of zinc concentrates by Sullivan for the use of Metals Reserve Company, in an amount not to exceed 1,500 tons per month, but not to exceed in the aggregate 10,000 short tons. The agreement specifically provided for Sullivan stockpiling such material "at its own expense", and also provided for the sale of same to Sullivan from time to time, as they were able to treat such concentrates. This agreement was amended at various times at Sullivan's request, in order to increase the amount of zinc concentrates that could be purchased monthly and the aggregate amount that could be purchased. By letter agreement dated July 12, 1944, the agreement was further amended in certain respects, including the following:

“If this Company (Metals Reserve Company) should for any reason remove material from stockpile for any purpose other than for sale to you (Sullivan Mining Company), you will be reimbursed for actual out-of-pocket expense incurred in connection therewith upon receipt from you of your signed statement reflecting the nature of each item of expense or cost and summarizing the work performed to which the charges apply (i.e., the tonnage removed, weighed and handled).”

That the demand made in Paragraph VIII of Plaintiff's Complaint for the payment of \$14,595.39, represents expenses Plaintiff incurred in connection with the input of storage of concentrates “as distinguished from the removal of concentrates”, and all expenses in connection with the removal of concentrates by Metals Reserve Company and Reconstruction Finance Corporation have been fully paid to Sullivan Mining Company.

## II.

That as further affirmative defense, Defendant alleges that the amendment to the original stockpiling contract made by letter agreement, dated July 12, 1944, further provides that:

“Metals Reserve may assign its interest under this contract to any other branch or agency of the Government of the United States of America, and upon such assignment such assignee shall acquire all the rights, powers and privileges of Metals Reserve hereunder, and shall be bound by all the duties and obligations of Metals Reserve here-

under, and Metals Reserve shall thereby cease to have any rights, powers, privileges, duties or obligations hereunder, it being expressly understood that any such assignment by Metals Reserve of its interest in this contract shall be subject to all the rights, powers and privileges of contractor hereunder and shall be conditioned upon such assignee's assuming all duties and obligations of Metals Reserve hereunder."

That on or about the 22nd day of October, 1948, the Plaintiff, Sullivan Mining Company, was advised by letter from Defendant that the Defendant was going to transfer and assign the physical custody of the entire Government stockpiles of zinc concentrates stored by Sullivan Mining Company to the Treasury Department, Bureau of Federal Supply, which has since become Emergency Procurement Service under General Services Administration. That said assignment was duly made and became effective on the 30th day of November, 1948. That said assignment provided, among other things, that:

"It being expressly understood and agreed that said Assignee shall hereby acquire all the rights, powers and privileges of Assignor under said agreement, as amended, and shall be bound by all the duties and obligations of Assignor under said agreement as amended, and Assignor shall hereby cease to have any rights, powers, privileges, duties or obligations under said agreement, as amended, it being further expressly understood that this assignment by Assignor of its interest in said agreement as



amended shall be and is subject to all the rights, powers and privileges of said Sullivan Mining Company under said agreement as amended, and shall be and is conditioned upon Assignee's assuming all duties and obligations of Assignor under said agreement as amended."

That all of the terms and conditions of the aforesaid assignment were accepted, approved, and agreed to by the Plaintiff herein, and that the Treasury Department (Bureau of Federal Supply) did assume all duties and obligations of Reconstruction Finance Corporation (Assignor) under the original stockpiling contract as amended. That by virtue of said assignment, the United States of America become a necessary party defendant to the above entitled action and all charges incurred in connection with the zinc concentrates remaining in the stockpile as of November 30, 1948, are chargeable to and the responsibility of the Treasury Department, Bureau of Federal Supply, which has since become the Emergency Procurement Service under General Services Administration. That if any liability exists in connection with the allegations of Paragraph VIII of Plaintiff's Complaint covering the removal of concentrates subsequent to November 30, 1948, upon which Plaintiff seeks recovery in the sum of \$40,268.71, it is the liability of the United States of America, Treasury Department, Bureau of Federal Supply, rather than the liability of the Defendant herein named.

As a further answer and affirmative defense to Plaintiff's Complaint, Defendant alleges that the

Plaintiff has been guilty of laches in failing to make any demand upon the Defendant for reimbursement for the sums alleged to be due in Paragraph VIII of Plaintiff's Complaint from the time that said stockpiling agreement was amended August 9, 1944, until claim was filed against Reconstruction Finance Corporation February 13, 1951.

Wherefore, having fully answered the Complaint of Plaintiff, Defendant, Reconstruction Finance Corporation, prays that said action be dismissed and held for naught, and that it recover its costs and disbursements.

/s/ STIMSON & DONAHUE,  
Attorneys for Defendant

Duly Verified.

[Endorsed]: Filed December 26, 1952.

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[Title of District Court and Cause.]

### STIPULATION

The parties to the above entitled action, acting by their respective counsel, hereby stipulate that upon the trial of the said action either party may offer in evidence either carbon copies or photostatic copies of any and all letters and/or documents which such party may wish to offer without being required to produce and offer the originals of such letters or of such documents, the opposing party reserving, however, the right to object to any and all such offers upon any ground except that no objections shall be made to the authenticity thereof.

Dated the 28th day of May, 1953.

/s/ CHAS. E. HORNING,  
BROWN & PEACOCK,

/s/ By ROBERT E. BROWN,  
Attorneys for Plaintiff

STIMSON & DONAHUE,

/s/ By L. VINCENT DONAHUE,  
Attorneys for Defendant

[Endorsed]: Filed November 2, 1953.

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[Title of District Court and Cause.]

MINUTES OF THE COURT

November 2, 1953

This cause came on for trial before the Court sitting without a jury, Chas. E. Horning and Robert Brown appearing as counsel for the plaintiff, and Stimson Donahue appearing for the defendant. On motion of Stimson Donahue, Thomas B. Paine was ordered entered as associate counsel for the defendant.

After a statement of the case by counsel, Wallace G. Wolf was sworn and examined as a witness on the part of the plaintiff, and documentary evidence was introduced.

Thereupon, the case was continued until 10 o'clock a.m., Tuesday, November 3, 1953.

November 3, 1953

This cause came on for further trial before the Court sitting without a jury.

Wallace G. Wolf was recalled and further examined as a witness on the part of the plaintiff,

and documentary evidence was introduced. Thereupon, the trial was continued until 10 o'clock a.m., Wednesday, November 4, 1953.

November 4, 1953

This cause came on for further trial before the Court sitting without a jury.

Walter Wolfe and Vernon Roehl were sworn and examined as witnesses on the part of the plaintiff, and here the plaintiff rests.

Plaintiff having rested, comes now the defendant and moves the Court for judgment of dismissal. The motion was taken under advisement. Here the defendant rests and both sides close.

It was agreed that argument be submitted on brief, plaintiff to have 30 days after transcript is filed to file opening brief, defendant 30 days to answer and plaintiff 20 days to reply. After filing of briefs if counsel desire the Court will fix a date for oral argument.

The Clerk was ordered to release exhibits to respective counsel for preparing their briefs.

May 19, 1954

Upon stipulation of counsel and good cause appearing, it was ordered that the plaintiff have 20 additional days within which to file its reply brief.

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[Title of District Court and Cause.]

### MEMORANDUM

Clark, District Judge.

This is an action brought by Sullivan Mining Company against the Reconstruction Finance Cor-

poration. The plaintiff and Metal Reserves Company in 1942 entered into a stockpiling agreement. The terms of the agreement and the modification thereof and other understandings between the parties are somewhat ambiguous. Both the original contract and the amendment thereto could and should have been made more definite and certain.

The Metals Reserve Company was dissolved by Congress in 1945 and all of its functions, commitments and liabilities were transferred to and assumed by this defendant.

It further appears that the Defendant transferred and assigned physical custody of the entire Government stockpiles of zinc concentrates stored by the plaintiff to the Treasury Department Bureau of Federal Supply, effective November 30, 1948.

The agreement provided, in effect, that the plaintiff should be reimbursed for actual out-of-pocket expense in the stockpiling of the concentrates.

Between August 9, 1944, and December 1, 1948, plaintiff incurred actual out-of-pocket expense in the sum of \$14,595.39 and subsequent to December 1, 1948, the plaintiff incurred actual out-of-pocket expense in the sum of \$40,268.71.

Without going into all the technical questions involved, this court feels that it would work a great injustice on the plaintiff here to say that the money actually spent in out-of-pocket expenses for the benefit of the defendant should be borne by plaintiff without reimbursement.

Defendant contends that it can in no way be held



liable for the \$40,268.71 amount. It appears that the defendant only transferred physical custody to the Bureau of Federal Supply and nothing is said about contractual commitments or liability. These are all government agencies and the assets of such agencies all would seem to have the same source.

Under its contract with the Government the plaintiff is entitled to reimbursement for the expenses which it incurred in constructing and maintaining the storage bins in which the government concentrates were stockpiled and for the expenses incurred in unloading and loading the concentrates from the railroad cars into the bins.

Plaintiff is entitled to judgment against the defendant as prayed for in the complaint. Counsel for the plaintiff may prepare Findings of Fact, Conclusions of Law and Judgment, submitting the original to the Court for its approval and serving a copy on opposing counsel.

Dated this 22nd day of July, 1954.

[Endorsed]: Filed July 22, 1954.

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[Title of District Court and Cause.]

### MOTION FOR NEW TRIAL

Comes now the defendant, Reconstruction Finance Corporation, and moves the Court for a new trial in the above entitled matter upon the grounds and for the reason that:

1. Error in law occurring at the trial and excepted to at the time by the defendant.

2. Insufficiency of the evidence to justify the decision of the Court and that the decision of the Court as made and entered, is against the law.

3. Error in the assessment of the amount of recovery, in that the assessment against defendant should in no event have exceeded \$14,595.39.

4. That the defendant, Reconstruction Finance Corporation has not been given substantial justice by virtue of the Court's decision.

Dated this 9th day of August, 1954.

/s/ L. VINCENT DONAHUE,  
Attorney for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed August 18, 1954.

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial and the Court, having heard the evidence and considered the stipulations of the parties and having considered the briefs filed by counsel for the respective parties, finds the facts and states the conclusions of law as follows:

### Findings of Fact

#### I.

The plaintiff, Sullivan Mining Company, an Idaho corporation, owns and operates an electrolytic zinc smelter at Silver King, Shoshone County, Idaho, and has operated said smelter continuously since

1928. The plaintiff also owns and under separate management it operates the Star Mine, a large zinc producer, in Shoshone County. At all of the times involved in this suit the plaintiff was engaged in processing at its said smelter the concentrates produced from zinc ores mined at its own Star Mine and in purchasing and smelting concentrates produced from various other zinc mines in Shoshone County.

## II.

On February 9, 1942, the United States being then engaged in the so-called Second World War, the Office of Price Administration issued a "Release" announcing that for the purpose of expanding the output of copper, lead and zinc by domestic mine operators the United States Government, acting through Metals Reserve Company (a corporation created by the Reconstruction Finance Corporation under the Reconstruction Finance Corporation Act), would for a period of two and one-half years beginning as of February 1, 1942, pay certain premium prices for all copper, lead and zinc which should be produced over certain specified quotas based upon 1941 production from the particular properties to which such quotas should be assigned. Such announcement was followed by a letter dated February 12, 1942, from said Metals Reserve Company to the plaintiff, explaining in detail the operation of the "premium price plan" and requesting the plaintiff to act as agent of Metals Reserve Company in the administration of the program. The agency was accepted by the plaintiff.



## III.

Pursuant to the plaintiff's acceptance of such agency and with full knowledge that the plaintiff's smelting capacity was inadequate to treat the quantities of zinc concentrates which even then were being tendered to Sullivan, and with full knowledge that Sullivan was already purchasing and stockpiling for its own account its normal emergency reserve of zinc concentrates, the Metals Reserve Company, itself, caused to be drafted in Washington and signed by its Executive Vice President and then forwarded to Sullivan Mining Company for its approval and execution the contract which was admitted in evidence in this case as Plaintiff's Exhibit No. 3. This contract, in the form of a letter, was dated June 18, 1942. It was executed by Sullivan in the exact form in which it was submitted.

## IV.

Said agreement provided that Sullivan, as agent for Metals Reserve Company, should purchase for the account of Metals Reserve Company zinc concentrates in specified monthly quantities. These concentrates were to be stockpiled by the plaintiff at its own expense, and were to be sold to the plaintiff from time to time as the plaintiff should be able to treat the same. In effect, Metals Reserve Company was to furnish to its agent the funds with which to purchase concentrates with the understanding that the funds so furnished by Metals Reserve Company would be repaid by the plaintiff and the plaintiff would then treat the concentrates

as if it had purchased and stockpiled them for its own account in the first instance.

#### V.

It was the understanding of both parties to said contract that in consideration of the plaintiff's stockpiling said concentrates at its own expense it was to have the right to re-purchase said concentrates and to process and market the same and thus derive a profit as it would in the case of its usual custom smelting operations.

#### VI.

The aforesaid contract of June 18, 1942, originally provided for the stockpiling of not to exceed 1,500 short tons of concentrates per month and not to exceed 10,000 short tons in all but that the Government's premium price plan so thoroughly accomplished its intended purpose that the number of shippers of zinc concentrates to the plaintiff's smelter increased from 15 to 45 or more and that the quantity of concentrates being tendered to the plaintiff, over and above the capacity of its smelter, so constantly increased that in order to avoid the curtailment of zinc mining the Government from time to time increased the tonnages which the plaintiff was authorized to purchase and stockpile for the Government's account.

#### VII.

Except for the various modifications of the contract increasing the tonnages of concentrates which plaintiff was authorized to purchase and stockpile for Metals Reserve Company, the contract of June 18, 1942, remained in its original form until it was

amended, as aforesaid, on July 12, 1944, giving Metals Reserve Company the right to remove from the stockpiles and ship to other smelters for treatment all or any portion of the concentrates purchased and stored by the plaintiff for the account of Metals Reserve Company. The July 12, 1944 amendment of the contract was introduced in evidence as Plaintiff's Exhibit No. 6.

#### VIII.

The original and the amended contracts between the plaintiff and Metals Reserve Company were amended about July 6, 1945 by substituting the defendant Reconstruction Finance Corporation for Metals Reserve Company as a party to said contracts. This amendment was evidenced by certain telegrams and letters which were introduced as evidence as a part of Plaintiff's Exhibit No. 9.

#### IX.

It was the plaintiff's understanding and was also the understanding and the intent of the Government at the time said amendment of July 12, 1944 was drafted by the Government and approved by the plaintiff that the plaintiff was to bear the expense of stockpiling all concentrates which should thereafter be processed by the plaintiff but that the plaintiff was to be reimbursed by the Government for all expenses incurred by the plaintiff in stockpiling any and all concentrates which might be removed by the Government and shipped to other smelters for treatment.

#### X.

The duration of the Government's stockpiling

as if it had purchased and stockpiled them for its own account in the first instance.

### V.

It was the understanding of both parties to said contract that in consideration of the plaintiff's stockpiling said concentrates at its own expense it was to have the right to re-purchase said concentrates and to process and market the same and thus derive a profit as it would in the case of its usual custom smelting operations.

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#### IX.

It was the plaintiff's understanding and was also the understanding and the intent of the Government at the time said amendment of July 12, 1944 was drafted by the Government and approved by the plaintiff that the plaintiff was to bear the expense of stockpiling all concentrates which should thereafter be processed by the plaintiff but that the plaintiff was to be reimbursed by the Government for all expenses incurred by the plaintiff in stockpiling any and all concentrates which might be removed by the Government and shipped to other smelters for treatment.

#### X.

The duration of the Government's stockpiling

program was extended from time to time and was finally terminated on June 30, 1947, and no concentrates were stockpiled for the Government after that date. The plaintiff had been authorized to stockpile for the Government 80,000 wet tons of concentrates and actually did stockpile 72,263.64 wet tons, and that the plaintiff actually and necessarily expended out of its own funds the sum of \$54,864.10 in the construction and maintenance of the bins in which said concentrates were stockpiled and in weighing and unloading said concentrates into said bins as the same were delivered to the plaintiff by the various shippers. The amount of the plaintiff's said expenditures was not disputed by the defendant.

## XI.

No portion of these concentrates was withdrawn from the Government stockpiles for processing by the plaintiff. Although the plaintiff at all times kept its smelter operating at full capacity except during a short period in which even with its employment of women on manual labor jobs and with its employment of Italian internees and coal miners who had been released from the Army to work in the metal mines, the plaintiff was unable to obtain sufficient labor to keep all of the units of its plant in full operation.

## XII.

It was not until about February 19, 1948, and after the termination of its stockpiling program that the Government indicated to the plaintiff its intention to ship to other smelters for processing

any of the concentrates which had been stockpiled by the plaintiff under its contracts with the Government.

### XIII.

Between February 19, 1948 and December 31, 1948 the defendant Reconstruction Finance Corporation caused approximately 19,224.06 wet tons of concentrates to be removed from the stockpiles and shipped to other smelters for processing.

### XIV.

While the plaintiff's contract with defendant Reconstruction Finance Corporation were in full force and effect the defendant on October 22, 1948 advised the plaintiff by letter (Plaintiff's Exhibit No. 17) that the defendant was turning the physical custody of the remaining stockpiled concentrates over to the Bureau of Federal Supply, effective October 31, 1948. This latter date was subsequently advanced to December 1, 1948. (Plaintiff's Exhibit No. 18).

### XV.

On or about November 30, 1948, the defendant Reconstruction Finance Corporation executed what purported to be an assignment of its contracts with the plaintiff to the Bureau of Federal Supply (Plaintiff's Exhibit No. 22). This purported assignment contained a provision to the effect that the assignment "shall be and is conditioned upon assignee's assuming all duties and obligations of assignor under said agreement, as amended".

## XVI.

At all times from and after the date on which the plaintiff was notified by the defendant Reconstruction Finance Corporation that the Government intended to ship at least a portion of the stockpiled concentrates to other smelters for processing the plaintiff persistently insisted upon its understanding that under the terms of its contract and amended contract with the defendant, plaintiff was entitled to reimbursement for all expenses incurred by the plaintiff in stockpiling for the Government any and all concentrates which should be removed from the stockpile and shipped to other smelters for processing and the plaintiff did not at any time release the defendant Reconstruction Finance Corporation from its obligation to so reimburse the plaintiff. The fact that all of the Government agencies involved in the matter also understood that the plaintiff was entitled to reimbursement for all expenses incurred by it in stockpiling all concentrates which should be removed and which had been removed from the stockpiles is evidenced by correspondence which passed between the plaintiff and these various Government agencies between October 22, 1948 and March 1, 1950 and is further evidenced by the fact that no question in this regard was raised by any of these Government agencies at the conferences between these agencies and representatives of the plaintiff in Washington as late as February 17, 1950, and is evidenced by the further fact that during the year 1949 the question, not as to whether the plaintiff was entitled to such



reimbursement but as to how the liability for the reimbursement of the plaintiff for all stockpiling expenses should be apportioned between the defendant Reconstruction Finance Corporation and the Bureau of Federal Supply, was the subject of various conferences in Washington between these two Governmental agencies.

### XVII.

In 1949 the plaintiff completed the construction and installation of an additional, or fourth, electrolytic unit with necessary auxiliary enlargement of the remaining parts of the smelting plant at a cost of approximately \$2,500,000.00. With that increased capacity the plaintiff was in a position to process the concentrates which were being currently shipped to the plaintiff as well as the concentrates which then remained in the Government stockpiles amounting to approximately 48,000 wet tons. The plaintiff offered to purchase these remaining stockpiled concentrates but its offer was not accepted and said concentrates were removed from the stockpiles by the Government and shipped and sold to other smelters, leaving the plaintiff with an excess of smelting capacity which it was able to utilize only by searching for and purchasing additional concentrates as a replacement of the Government concentrates that were so removed and shipped elsewhere for processing.

### XVIII.

It was not until on or about March 1, 1950 that the plaintiff was advised that the Government and all of its involved agencies denied all liability for

the reimbursement of the plaintiff for any of its stockpiling expenses.

## XIX.

As between the plaintiff and the defendant Reconstruction Finance Corporation the purported assignment from the defendant to the Bureau of Federal Supply on November 30, 1948, never became effective, except to transfer the physical custody of the remaining concentrates to the Bureau of Federal Supply, by reason of the fact that the condition of the assignment, that is to say, the assumption by the Bureau of Federal Supply of all duties and obligations of the defendant under the Government's contracts with the plaintiff was not only never fulfilled but ultimately such obligations were expressly repudiated.

## Conclusions of Law

### I.

That this Court has jurisdiction of this action and the parties hereto.

### II.

That as between the plaintiff and the defendant Reconstruction Finance Corporation the purported assignment from the defendant to the Bureau of Federal Supply on November 30, 1948, never became effective, except to transfer the physical custody of the remaining concentrates to the Bureau of Federal Supply, by reason of the fact that the condition of the assignment, that is to say, the assumption by the Bureau of Federal Supply of all

duties and obligations of the defendant under the Government's contracts with the plaintiff was not only never fulfilled but ultimately such obligations were expressly repudiated.

III.

That the plaintiff Sullivan Mining Company is entitled to judgment against the defendant Reconstruction Finance Corporation or for the sum of \$54,864.10 together with interest thereon at 6 percent per annum from the 12th day of October, 1948 and for plaintiff's costs.

Dated August 26th, 1954.

/s/ CHASE A. CLARK,  
District Judge

[Endorsed]: Lodged August 16, 1954.

[Endorsed]: Filed August 26, 1954.

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In the United States District Court for the District  
of Idaho, Northern Division

No. 1868

SULLIVAN MINING COMPANY, a corporation,  
Plaintiff,

vs.

RECONSTRUCTION FINANCE CORPORATION, a corporation,  
Defendant.

JUDGMENT

The Court having heretofore filed its opinion in this case and findings of fact and conclusions of

law therewith having been signed and filed, and good cause appearing,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff Sullivan Mining Company have and recover from the defendant Reconstruction Finance Corporation the sum of \$54,-864.10 with interest thereon at the rate of 6 percent per annum from the 12th day of October, 1948, together with plaintiff's costs.

Dated August 26th, 1954.

/s/ CHASE A. CLARK,  
District Judge

[Endorsed]: Lodged August 16, 1954.

[Endorsed]: Filed August 26, 1954.

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[Title of District Court and Cause.]

### MOTION FOR NEW TRIAL

Comes now the defendant, Reconstruction Finance Corporation, and moves the Court for a new trial in the above entitled matter upon the grounds and for the reason that:

1. Error in law occurring at the trial and excepted to at the time by the defendant.

2. Insufficiency of the evidence to justify the decision of the Court and that the decision of the Court as made and entered is against the law.

3. Error in the assessment of the amount of recovery in that the assessment against defendant should in no event have exceeded \$14,595.39.

4. That the defendant, Reconstruction Finance Corporation has not been given substantial justice by virtue of the Court's decision.

Dated this 28 day of August, 1954.

L. VINCENT DONAHUE,  
Attorney for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed September 3, 1954.

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[Title of District Court and Cause.]

### MINUTES OF THE COURT

October 11, 1954

This cause came on for hearing on Motion for New Trial, Messrs. Robert E. Brown and Chas. E. Horning appearing for the plaintiff, and L. Vincent Donahue appearing for the defendant.

After hearing counsel, the Court took the matter under advisement.

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[Title of District Court and Cause.]

### ORDER

This matter is before the Court at this time on Defendant's Motion for New Trial. Oral argument was heard, and the matter was taken under advisement. The Court has fully considered the grounds urged in support of the motion, and is of the opinion that the Motion should be denied.



It appeared to the Court at the time decision was rendered in this matter, and does at the present time, that any agency involved in the stockpiling was a government agency from the beginning agreement until the conclusion of the stockpiling, and that the present defendant Reconstruction Finance Corporation is the agency liable, as the purported assignment to Bureau of Federal Supply only transferred physical custody and the terms and conditions of the agreement were never fulfilled. It was the government concerned in all instances.

Now, Therefore, it is Hereby Ordered that the Motion for a New Trial be and the same is hereby denied.

Dated this 15th day of February, 1955.

/s/ CHASE A. CLARK,  
Chief Judge, United States District Court, District  
of Idaho.

[Endorsed]: Filed Feb. 15, 1955.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that the Reconstruction Finance Corporation, a corporation created by an act of Congress, of the United States of America, the capital stock of which said corporation is wholly owned by the United States Government, the defendant above-named does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit

from the final judgment entered in this action, August 26, 1954, and filed for record in the above-entitled Court on said date and from each and every part thereof, and from all rulings of the Court; and from that certain order in the above-entitled cause signed by the Court, February 15, 1955, and filed for record in said Court on said date, denying defendants' Motion for a new trial, and from each and every error of law committed by the Trial Court.

Dated this 10th day of March, 1955.

/s/ L. VINCENT DONAHUE,  
/s/ STIMSON & DONAHUE,  
/s/ TOM B. PAINE,

Attorneys for Defendant  
and Appellant.

[Endorsed]: Filed March 12, 1955.

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[Title of District Court and Cause.]

## DESIGNATION OF CONTENTS OF RECORD

Comes now, Reconstruction Finance Corporation, a corporation organized and existing by an act of Congress, of the United States of America, the capital stock of which said corporation is wholly owned by the United States Government, and pursuant to the provisions of Rule 75 (a) of the Federal Rules of Civil Procedure, and hereby designates for inclusion the complete record of all proceedings, evidence and exhibits in the above-entitled



action to constitute the record on appeal with the United States Circuit Court of Appeals for the Ninth Circuit.

The Clerk of the above-named Court is hereby directed to prepare, certify and transmit to said Circuit Court of Appeals the above designated complete record and all the proceedings, exhibits and evidence in said action.

Dated this 10th day of March, 1955.

/s/ L. VINCENT DONAHUE,  
/s/ STIMSON & DONAHUE,  
/s/ TOM B. PAINE,  
Attorneys for Defendant  
and Appellant.

Acknowledgment of Service attached.

[Endorsed]: Filed March 21, 1955.

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[Title of District Court and Cause.]

### MOTION TO WITHDRAW EXHIBITS

Comes now the Defendant, Reconstruction Finance Corporation through its attorney, L. Vincent Donahue, and moves the Court for an Order permitting all the exhibits introduced in the above entitled trial to be withdrawn and mailed to the Defendant and permitting the Defendant to examine the same for a period of ten (10) days in

connection with Defendant's preparation of its designation of the portions of the record which Defendant and Appellant thinks necessary for consideration by the Circuit Court of Appeals.

This Motion is based upon the records and files herein and upon the Affidavit of L. Vincent Donahue hereto attached and made a part hereof.

/s/ L. VINCENT DONAHUE,  
Attorney for Defendant  
and Appellant.

State of Washington,  
County of Spokane—ss.

L. Vincent Donahue, being first duly sworn on oath, deposes and says: That he is one of the attorneys for the Defendant and Appellant, Reconstruction Finance Corporation in the above entitled action. That Notice of Appeal to the Circuit Court of Appeals was duly filed in the above entitled Court on the 12th day of March, 1955. That the Defendant and Appellant desires to prepare forthwith a designation of portions of the record which Appellant thinks necessary for consideration by the Circuit Court of Appeals and the designation of that portion of the record to be included in the printed record to be prepared by the Clerk of the Circuit Court of Appeals. That it will be impossible for the attorneys for Appellant to properly prepare said designation without the careful examination of the exhibits introduced in the trial of said case.

/s/ L. VINCENT DONAHUE,

Subscribed and sworn to before me this 16th day of March, 1955.

[Seal]            /s/ EARL E. STIMSON,  
Notary Public in and for the State of Washington,  
residing at Spokane.

Acknowledgment of Service attached.

[Endorsed]: Filed March 21, 1955.

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[Title of District Court and Cause.]

### ORDER TO WITHDRAW EXHIBITS

This matter coming on regularly for hearing upon the Motion of L. Vincent Donahue, one of the attorneys for Reconstruction Finance Corporation, the Defendant and Appellant in the above entitled action requesting the withdrawal of the exhibits in the trial of the above entitled action for examination in connection with the preparation of the designation of the portions of the record to be printed in the Circuit Court of Appeals, and after hearing said Motion and being fully advised in the premises.

It is hereby ordered, adjudged and decreed that all of the exhibits introduced in said cause be mailed to L. Vincent Donahue, 421 Symons Building, Spokane, Washington and that he be allowed to examine said exhibits for a period of ten days and that said records then be returned forthwith to the Clerk of the United States District Court, at Boise, Idaho, or Coeur d'Alene, Idaho.

Done in open court this 21st day of March, 1955

/s/ FRED M. TAYLOR

Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed March 21, 1955.

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[Title of District Court and Cause.]

### ORDER

Good cause appearing therefor,

It is ordered that the time within which the record on appeal may be filed and the appeal docketed in the United States Court of Appeals for the Ninth Circuit be, and the same hereby is extended to May 21st, 1955.

/s/ CHASE A. CLARK,

Chief District Judge.

[Endorsed]: Filed April 18, 1955.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and

as are necessary to the appeal under Rule 75 (RCP) to-wit:

1. Complaint.
2. Summons with return attached.
3. Motion to Dismiss.
4. Minutes of the Court on November 5, 1952.
5. Answer and Affirmative Defense.
6. Stipulation re: copies of documents offered in evidence.
7. Minutes of the Court of November 2, 1953.
8. Minutes of the Court of November 3, 1953.
9. Minutes of the Court of November 4, 1953.
10. Minutes of the Court of May 19, 1954.
11. Memorandum Opinion, Judge Clark.
12. Affidavit of Service.
13. Motion for New Trial filed Aug. 18, 1954.
14. Findings of Fact and Conclusions of Law.
15. Judgment.
16. Motion for New Trial filed Sept. 3, 1954.
17. Minutes of the Court of Oct. 11, 1954.
18. Order Denying Motion for New Trial.
19. Notice of Appeal.
20. Designation of Contents of Record.
21. Motion to Withdraw Exhibits.
22. Order to Withdraw Exhibits.
23. Order Extending Time for Docketing Appeal.
24. Transcript of Testimony.
25. Exhibits Nos. 1 to 33 inclusive and 35 to 40 inclusive.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 2nd day of May 1955.

[Seal]

ED. M. BRYAN,  
Clerk.

/s/ By LONA MAUSER,  
Deputy.

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In the United States District Court for the District  
of Idaho, Northern Division

No. 1868

SULLIVAN MINING COMPANY, a corporation,  
Plaintiff,

vs.

RECONSTRUCTION FINANCE CORPORA-  
TION, a corporation, Defendant.

### TRANSCRIPT OF PROCEEDINGS

This cause was tried before the Honorable Chase A Clark, sitting without a jury, at Coeur d'Alene, Idaho, on November 2, 1953.

Appearances: Chas. E. Horning, Wallace, Idaho, Robert E. Brown, Kellogg, Idaho, attorneys for the Plaintiff. L. Vincent Donahue, 421 Symons Bldg., Spokane, Wash., Tom B. Paine, Wallace, Idaho, Attorneys for the Defendant.



November 2, 1953, 10:00 o'clock a.m.

Mr. Donahue: At this time I would like to have the record show that Thomas B. Paine, who is an Idaho attorney, will be associated with me in the trial of this case.

The Court: The record may so show.

(Statement made by Mr. Horning as to the issues to be presented.)

WALLACE G. WOLF

Called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Brown): Where do you reside, Mr. Wolf?

A. I reside at the Silver King site of the zinc plant of the Sullivan Mining Company.

Q. Is that in Idaho?

A. Yes, sir, close to Kellogg.

Q. And by whom are you employed?

A. The Sullivan Mining Company.

Q. In what capacity?

A. I am superintendent of the Electrolytic Zinc Plant of the Sullivan Mining Company. [1\*]

Q. Where is that Electrolytic Zinc Plant located?

A. Up Government Gulch, approximately three miles from Kellogg.

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\* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Wallace G. Wolf.)

Q. Will you explain the operation of that plant, what its purpose is?

A. The plant treats zinc concentrates and produces a special high grade electrolytic zinc metal which it sells. In the processing of those concentrates it also produces electrolytic cadmium metal which it also sells. In the treatment of the concentrates, after the zinc is removed by a process of leaching there is a residue containing the portion of the concentrate that is not soluble in sulphuric acid which is used as the leaching agent. That residue contains lead, silver and a small quantity of gold. That residue is shipped to the Bunker Hill and sold to the Bunker Hill smelter, of the Bunker Hill and Sullivan Mining and Concentrating Company. In the electrolytic cadmium plant there is a by-product of copper material which has been sold to the Tacoma Smelter of the American Smelting and Refining Company.

Q. Mr. Wolf, from time to time in the course of this hearing reference will be made to the Bunker Hill and Sullivan Mining and Concentrating Company, what, if any relation exists between the Sullivan Mining Company [2] and the Bunker Hill and Sullivan Mining and Concentrating Company?

A. The Sullivan Mining Company is owned by the Bunker Hill and Sullivan Mining and Concentrating Company and the Hecla Mining Company,—each company having a 50 per cent ownership. The Sullivan Mining Company operates the Electrolytic Zinc Plant and it also operates its own Star

(Testimony of Wallace G. Wolf.)

Mine. The management of the zinc plant is under the general manager of the Bunker Hill and Sullivan Mining and Concentrating Company; Mr. Haefner who is my superior,—the operation of the Star Mine is under the management of the Hecla Mining Company.

Q. By that do you mean that the stock of the Hecla Mining Corporation is owned equally by these other two companies?      A. That is correct.

Q. How long have you acted as superintendent of their Electrolytic Zinc Plant?

A. Since the project was conceived and I have been the superintendent since the plant started in operation, in 1928, I have been superintendent ever since.

Q. You were acting in that capacity in 1942?

A. I was.

Q. Mr. Wolf, there has been handed to you what was marked as Plaintiff's Exhibit No. 1 for the purpose of [3] identification. I will ask you what that is?

A. That is a release from the Office of Price Administration under date of February 8, 1942. It sets out some of the detail of the over quota production of copper, lead and zinc under the premium price plan, whereby the production in excess of quotas which were to be established for various mines or groups of mines, will be paid at certain stipulated premium prices for lead, copper and zinc.

(Testimony of Wallace G. Wolf.)

Q. Had you any information with respect to the premium price plan prior to that announcement?

A. I had received an earlier release announcing that such a price plan would be set up, a premium price plan.

Q. Prior to this release of February 19, 1942, did you have any official notice of the plan?

A. No, just a notice that such a plan was in contemplation and would be announced later, the details would be announced later.

Q. Did this serve as the first specific information to you as to what a plan would be or would amount to?           A. It did.

Mr. Brown: We offer in evidence Plaintiff's Exhibit No. 1.

Mr. Donahue: If your Honor please, we [4] have found in this case and it is true of counsel for both sides, that much of the original correspondence between these two parties was not available, some had been mislaid, some lost and as a consequence we have entered into a stipulation with respect to the introduction in evidence of carbon copies or other copies of the various correspondence and I think that the stipulation possibly should be filed.

The Court: That stipulation may be filed.

Mr. Donahue: There is no objection on our part to Plaintiff's Exhibit No. 1.

The Court: It may be admitted.

Q. Mr. Wolf, you have been handed, by the bailiff, an instrument marked as Plaintiff's Exhibit

(Testimony of Wallace G. Wolf.)

No. 2 for identification and I will ask you what that is?

A. It is a letter under date of February 12, 1942, addressed to the Sullivan Mining Company, 1022 Crocker Building, San Francisco, California, and it is signed by G. Temple Bridgman, executive vice president of the Metals Reserve Company, and it sets out the details of handling the premium price plan for over-quota production of lead, copper and zinc and asks if the company will be willing to act as an agent in the pursuit of that plan. [5]

Mr. Brown: I offer this exhibit in evidence at this time.

Mr. Donahue: We have no objection.

The Court: It may be admitted.

Q. Mr. Wolf, did your company accept the appointment as agent for the Metals Reserve Company?

A. Yes, sir, we did.

Q. In your company's capacity as agent for the Metals Reserve Company to handle the premium price plan, will you explain briefly to the Court what you did for them?

A. The plan set forth that as agent we were to receive zinc concentrates which were normally tendered to us. We were to submit to the Metals Reserve Company details of settlement, contracts and settlement schedules for those concentrates. We were to buy the concentrates and pay for them in the normal course of business. We were to receive from the shippers statement as to their over-quota production; we were to be given information about



(Testimony of Wallace G. Wolf.)

what their individual quotas were and we were to handle, for the government, the payment to those individual shippers for their over-quota production of zinc and metals contained in these zinc concentrates which were shipped to us in excess of their normal quotas. The Metals Reserve Company arranged with us to have a revolving fund and we [6] paid those shippers for the over-quota premium price from that fund and we, of course, had to send to the Metals Reserve Company certain statements showing the settlement, the tonnage and detail to justify those payments.

Q. Who established the quota?

A. The Metals Reserve Company.

Q. Did your company receive any part of that premium price that you were paying those shippers?

A. No, we did not.

Q. Plaintiff's Exhibit No. 2,—or is it Plaintiff's Exhibit No. 1, it sets forth that the purpose of this plan was to stimulate domestic production of copper, lead and zinc. After your acceptance of the agency appointment from the Metals Reserve Company, what was your experience as to whether it did stimulate production?

A. There was a great stimulation of production. Mines which had regularly shipped to us zinc concentrates prior to this plan increased their shipments and there were numerous other productions that were offered to us and which we accepted and received. We had, as I recall, prior to that plan, something like 15 regular shippers and because of



(Testimony of Wallace G. Wolf.)

that plan we eventually had some 45 to 47 shippers to our plant of those zinc concentrates.

Q. Was your company paid any compensation for acting as agent for the Metals Reserve Company? [7]           A. None whatever.

Q. Mr. Wolf, the bailiff has handed you Plaintiff's Exhibit No. 3 marked for identification, I will ask you what that is?

A. That is a letter written under date of June 18, 1942, to the Sullivan Mining Company, Kellogg, Idaho, from the Metals Reserve Company signed by G. Temple Bridgman, executive vice president of the Metals Reserve Company. This was a letter covering the contract for the handling of the premium price concentrate. The letter, in its concluding paragraph says, "If the foregoing is acceptable to you, please sign and return". It was signed by the Sullivan Mining Company by Mr. Stanly A. Easton, vice president.

Mr. Brown: We offer in evidence Exhibit No. 3.

Mr. Donahue: We have no objection.

The Court: It may be admitted.

Q. Prior to June 18, 1942, the date of Exhibit No. 3, had you stockpiled any zinc concentrates for and on behalf of the Metals Reserve Company?

A. No.

Q. Exhibit No. 3 states in the course of the exhibit, that the government was aware at that time that you didn't have adequate facilities for the processing of all of [8] the production then com-

(Testimony of Wallace G. Wolf.)

ing from your district, was the inadequacy a result of this stimulated production?

A. We were tendered more concentrates than we could process so it was the stimulation that caused us to receive concentrates above and beyond our ability to process.

Q. After the execution or acceptance by your company of this contract, Plaintiff's Exhibit No. 3, did you start to stockpile zinc concentrates?

A. We did.

Q. Where and how did you stockpile the concentrates?

A. The zinc plant is in a narrow gulch. At that time we had no facilities for stockpiling any concentrates above the capacity of its receiving bins. We had previously stored such concentrates on the grounds of the Bunker Hill smelter; they had trackage, some bin space, trains and cranes for removing concentrates from the cars and loading them into cars. We stockpiled at the Bunker Hill smelter and the Bunker Hill charged us the cost of doing that work.

Q. Do you mean that immediately after this contract of June 18, 1942, at the commencing of your stockpiling you were using facilities then in existence?

A. We had stockpiled previous to entering into this contract, certain tonnage of zinc concentrate, using the facilities of the Bunker Hill smelter and as [9] these premium price plan concentrates

(Testimony of Wallace G. Wolf.)

started coming in we used what bins were then available, some of them had to be repaired and maintained, then as the tonnage increased, shortly afterward, we used some of the bins that were normally used by the Bunker Hill and Sullivan Mining and Concentrating Company in its operation,—bins that they used to store coke, flux and by-products. They made some of those bins available to us and we stored concentrates in those bins. The tonnage continued to increase and we then had to provide additional storage. The smelter previous to that time had prepared a site for its use in what is called Magnet Gulch. They had done a considerable amount of filling and leveling in this gulch with the intention of using that ground in the operation of the smelter. We used that ground and bins were built on that ground to store the excess zinc concentrates which we were receiving under this contract. The bins were of wood, we laid fills down and put in a floor of lumber so that the concentrates would not be on the rough and uneven ground, then we built partitions also of lumber because the concentrates had to be segregated in accordance to the individual shippers, they had to be kept separate. This was during the war years when it was difficult to get supplies, there was a shortage of lumber, and there was a shortage of [10] labor. The Sullivan Mining Company Zinc Plant provided the lumber and the smelter used its labor, carpenters and so on, to build the bins. It was under the stress of war time and we had to pursue those methods in order to

(Testimony of Wallace G. Wolf.)

have space available for those concentrates as they came in and as we received them.

Q. As I understand it, in the immediate vicinity and on your own ground, the Sullivan Mining Company did not have room for the storage of those concentrates and they were stockpiled, actually, on the ground of the Bunker Hill smelter?

A. That is right.

Q. What is the Bunker Hill smelter?

A. The Bunker Hill smelter is owned by the Bunker Hill and Sullivan Mining and Concentrating Company which, as I have testified earlier, owns one half of the Sullivan Mining Company. The Sullivan Mining Company is an affiliate and Mr. Haefner is the general manager of the Bunker Hill and Sullivan Mining and Concentrating Company and also of the zinc plant, the result is that the Bunker Hill smelter and the zinc plant cooperate very closely because of the close connection between the two.

Q. Does the Bunker Hill smelter smelt zinc as its principal process?

A. No, its principal process is the smelting of lead [11] concentrate. I might explain that in the Coeur d'Alene district from which normally the bulk of our intake is received, the ores are mixed lead and zinc ores and in the process of concentrating in mills, a lead concentrate is produced which in many instances goes to the Bunker Hill smelter and the zinc comes to the zinc plant of the Sullivan Mining Company.

(Testimony of Wallace G. Wolf.)

Q. Mr. Wolf, were you charged by the Bunker Hill smelter for the labor that you spoke of, in connection with the storage?      A. We were.

Q. Was that paid?

A. Yes, we paid it.

Q. Did I understand from you that the facilities actually used for unloading the concentrates into the stockpile was that of the Bunker Hill smelter?      A. Yes, sir, entirely so.

Q. What type of machine is that?

A. They have a locomotive crane that operates on a railroad track; the cars are switched in that track and the concentrates are removed by this crane from the cars into the stockpile.

Q. It was through that facility that the concentrates were unloaded into the stockpile?

A. That is correct. [12]

Q. Were you charged for the use of the crane in unloading the concentrates?

A. Yes, we were.

Q. Did you pay it?

A. We did, yes, sir.

Q. Mr. Wolf, Plaintiff's Exhibit No. 3 which was the contract under which you commenced stockpiling for the Metals Reserve Company provided that you should stockpile at the rate of not to exceed 1500 short tons per month. The time or period of the contract was seven months and you were to stockpile for them a maximum of 10,000 tons. Subsequent to its execution was there a modification of that contract with respect to the period of time it



(Testimony of Wallace G. Wolf.)

should run and the amount of tonnage you were authorized to stockpile?

A. Yes, sir, in the ensuing period of time the original contract was amended to increase the tonnage to be stored and also the length of time that it was to run, the time was extended.

Mr. Brown: By agreement with counsel we have here Exhibit marked Plaintiff's Exhibit No. 4 and we offer this in evidence.

Mr. Donahue: We have no objection to the exhibit.

The Court: It may be admitted. [13]

Q. Mr. Wolf, Exhibit No. 4 extended the contract, that is, in sequence it finally extended the contract to July 18, 1944, to allow for the increase in tonnage to 25,000 tons. At that time,—was that a continuing program of stockpiling?

A. It was a continuous program of stockpiling, yes.

Q. So that after the entry of the contract in June of 1942, you just continued receiving concentrates and stockpiling them to the account of the Metals Reserve Corporation?

A. That is correct.

Q. What effect, Mr. Wolf, did the stimulation of production of zinc from the mines in the Coeur d'Alene district have upon the average of zinc concentrate?

A. Because of the premium price plan the mines produced an increased tonnage of concentrate. With particular reference to the Pine Creek section of the



(Testimony of Wallace G. Wolf.)

Coeur d'Alene district there were a number of those small companies that had inadequate mills, they were trying to put as much ore through those mills as they possibly could and the result was that the grade of concentrate was lowered in zinc content and also there were some tailings in the main valley of the Coeur d'Alene River that had been there for many years, they were being processed in many instances and they also gave a lower grade of concentrate [14] than we had generally received. We, at the zinc plant, received these concentrates and in furtherance of the war effort we processed as large a tonnage of these low grade concentrates as we could. We had to commingle them with the better grade concentrates and there was only a limited percentage of the total that we could process in our plant but we endeavored to process the maximum tonnage of those concentrates that we possibly could.

Q. With respect to the stockpile and the concentrates that were put into the stockpile, were those concentrates coming from the various properties that you put in the stockpile all commingled?

A. No. Because of the inadequate storage, the inadequate number of bins that we had available, we attempted to receive and process the smaller productions and we only put into the stockpile the production from the larger producers, the larger shippers, as a matter of fact the concentrates that we put into the Metals Reserve Company stockpile were limited to a very few producers. The concen-

(Testimony of Wallace G. Wolf.)

trates from each shipper had to be maintained separate and apart from any and all other shippers and for that reason it was necessary for us to stockpile only what we could not process immediately there in order not to have a small tonnage usurping a lot of space.

Q. Correct me if I am not clear on this, Mr. Wolf. As I [15] understand it, if Y concentrate and X concentrate were going into the Metals Reserve stockpile there would be separate piles or separate lots, is that right?

A. X concentrate would be segregated and kept apart from concentrate Y and during the establishment of these stockpiles, while we were storing these concentrates for the Metals Reserve account, irregular intervals we had an inspector of the government come up and look at these piles and the manner of handling them was in accordance with the instructions received from these inspectors and the general instructions that we received from the Metal Reserve at Washington.

Q. I wish you would examine that instrument you have and tell me whether or not there was any requirement as to the grade of the material you were to keep in the stockpile for the Metals Reserve, any standard?

A. Without reading this in detail, it was my understanding that the statement was made that we would purchase the concentrates which we normally received and stockpile that portion of it which was in excess of our capacity to treat.

(Testimony of Wallace G. Wolf.)

Q. So there was no specific standard set forth as to the percentage of zinc in the concentrate that you were to stockpile to their account? [16]

A. Definitely not in this contract.

Q. The bailiff has handed you two instruments, Mr. Wolf, they are marked as Plaintiff's Exhibit No. 5 for identification and I will ask you to state what they are?

A. The first is a letter dated June 3, 1944, addressed to the Sullivan Mining Company, Kellogg, Idaho, attention Mr. Stanly A. Easton. It is signed by H. DeWitt Smith, executive vice president of the Metals Reserve, re: Silver King stockpiling agreement No. AA-29 zinc concentrate. In this letter it sets forth that the Sullivan Mining Company has purchased, for the account of Metals Reserve 3,996.03 short tons of concentrate averaging about 39 per cent zinc and 15 per cent lead, and it stated that additional purchases during April and May may increase this tonnage to about 4,500 tons. It points out that they did not wish to include concentrates of this grade in their stockpile and asked us to repurchase from them this low grade concentrate.

Q. I think that you have given sufficiently of that letter, Mr. Wolf, now, the second that you have there is in response to that one, is it?

A. The second letter is written by Mr. Stanly A. Easton, vice president of the Sullivan Mining Company, in reply to this letter which I spoke of. It pointed out that [17] the Sullivan Mining Company had accepted all shipments from mines in this

(Testimony of Wallace G. Wolf.)

area that contained sufficient metal to pay its way in a genuine effort to support and stimulate to the fullest degree, all mine production. It pointed out also that during the year 1941 the Sullivan Mining Company purchased and processed 2951 tons of such sub-grade material; during the year 1942 it purchased and processed 12,337 tons of such sub-grade material; during the year 1943 it purchased and processed 12,620 tons of such sub-grade material and put into the Metals Reserve only 2753 tons which was the first of that material to be stored for the Metals Reserve Company account. It also pointed out that of the 45 different individual shippers the production of 27 of such shippers is all under 50 per cent zinc. In brief, it pointed out why we wanted to accept that type of material, low grade material and why we wanted to stockpile it, first, because we were processing as much as we could and secondly, because if we stockpiled a high grade material of zinc concentrate that contained a higher percentage of cadmium which was then in very short supply, it decreased our output of cadmium metal. Mr. Easton finally pointed out that we were withholding the approval of the plan set out by Mr. H. DeWitt Smith in a former letter and stating that the Sullivan Mining [18] Company wanted to cooperate fully and wanted the Metals Reserve to examine the situation and to send a representative to do so if they care to do that.

Mr. Brown: I offer Exhibit 5 in evidence at this time.



(Testimony of Wallace G. Wolf.)

The Court: Do you have any objection, Mr. Donahue?

Mr. Donahue: No objection.

The Court: It may be admitted.

Q. Until the time of this Plaintiff's Exhibit No. 5 had you had any question raised with respect to the grade of the concentrate going into the stock-pile?

A. None at all, in fact when that letter came to my attention I was somewhat surprised because previous to that time Mr. Haffner and myself and Mr. Fedderson, who is superintendent of the lead smelter of the Bunker Hill Company, had been called to a conference in Salt Lake City, Utah, along with other producers and smelters. This conference was under the direction of Howard Young, who at that time was an official of the War Production Board, he was president of the American Mining Congress and an outstanding mining man. We met in the Hotel Utah and the conference was divided into two groups, the lead producers group and the zinc producing group. I attended the zinc producing and processing group which was headed [19] up by Mr. Young himself. At that time we discussed the situation and the possible production of metal from our respective plants and we were urged to produce every pound of metal that we could because of the urgency of the war situation. So, having returned from that conference, in my way I did as much as I could, processed and received as much of this zinc concentrate, if we could



(Testimony of Wallace G. Wolf.)

handle and treat them, I felt that it was our duty.

Mr. Donahue: I believe that we are going out of line here in giving opinion evidence of the witness and also some considerable hearsay.

The Court: I presume that is true but this being a court matter and I am very desirous of getting all of the understandings that everybody had and I can assure you that I will eliminate that part which I do not consider relevant in making my decision. I won't hew too close to the technical rules the same as I would if we were trying this matter before a jury. I think with that understanding you may go ahead.

Q. Now, Mr. Wolf, will you go ahead with your answer?

A. I accepted these concentrates and we processed such tonnage of the low-grade concentrates as we could. It was only because the receipts of them were in excess of our ability to process that we had to stockpile; we [20] stockpiled some in the stockpile owned by the Sullivan Mining Company and later on we started to stockpile for the Metals Reserve and that brought up this letter about their dislike of stockpiling for their accounts this sub-grade material.

Q. On the basis of the quantity of these low-grade concentrates that were produced and sent to you, can you state what percentage you were processing against the percentage that was going into the Metals Reserve stockpile?

A. Without referring to any specific statistics I

(Testimony of Wallace G. Wolf.)

am unable to state definitely but I would say that we were processing 80 to 85 per cent of that low-grade concentrate that was sent to us and we didn't store over 15 per cent in the Metals Reserve stockpile.

Q. Did I understand, Mr. Wolf, that at the same time you were stockpiling for the government the Sullivan Mining Company was also stockpiling?

A. Yes, we maintained a stockpile for our own account, and as the exchange of letters modifying that agreement will show, we were supposed to maintain a stockpile of some 10,000 tons of concentrate for our own account, which we did.

Q. How were those concentrates handled upon receipt, that were stockpiled for your own account?

A. They were handled and received, stored in bins and handled just the same as the Metals Reserve except they were kept in separate bins and separate from the concentrates of the Metals Reserve but on the same ground and in close proximity to the Metal Reserve stockpile.

Q. Who unloaded those concentrates?

A. The Bunker Hill smelter crew.

Q. Was the same service used, the same crane service used in the stockpile of the Metals Reserve?

A. Yes, sir, as a matter of fact, there was no differentiation in the cost and all of the bills tendered to us all of the bills submitted by the Bunker Hill simply stated the entire cost, the tonnage of concentrates that had been unloaded and handled and the entire cost, and that was given to us in one

(Testimony of Wallace G. Wolf.)

account and we at the zinc plant had to segregate between the Metals Reserve and the Sullivan Mining Company but we didn't do that at the first, that is, at the beginning because we had every thought in mind that the concentrates were stored and would be processed by us so we didn't think there was any necessity of considering or handling the bills in any other manner, we simply paid the bills as given to us by the smelter.

Q. Did you subsequently allocate the cost on a tonnage [22] basis to the Metals Reserve and your own stockpile?

A. Yes, sir, that was much later on, we had to allocate the cost in proportion to the tonnage that had been unloaded and charged to the Metals Reserve and the tonnage of concentrates to the Sullivan Mining Company.

Q. At this point, Mr. Wolf, it might be well to explain, because it might come up from time to time, that is, reference to wet tons and dry tons of concentrate, will you briefly explain what the difference is?

A. The concentrates as received from the shippers contain a considerable percentage of moisture, the ore is milled by a wet milling process. The concentrates finally produced are put over a filter to remove the excess of water; that cannot be done in total so the concentrates vary in moisture from a minimum of 7 per cent to a maximum of 15 or 16 per cent. Some of the smaller shippers, because of inadequate facilities, ship us very wet concentrate.

(Testimony of Wallace G. Wolf.)

Dry tons means the actual tonnage of the concentrate with the moisture removed and wet tons refer to the concentrates plus the moisture content.

The Court: You didn't remove any of the moisture yourself before placing them in bins?

A. No, sir. [23]

Q. Do I understand then that it is the wet tons that actually came from the shipper and went into the stockpile?      A. That is right.

Q. And as it remained there for sometime with the evaporation and so on that took place did you refer to it as dry tons?

A. No, when they were removed from the stockpile they also contained moisture, it might be lower than when it was originally put in the stockpile but it still had considerable moisture and was considered wet, however, settlement was on the dry ton basis, of course, you are not paying for the water content.

Q. It might be well to explain how you figure the dry ton weight?

A. A sample of the tonnage under consideration is generally weighed over the railroad scale and the tare weight or the weight of the concentrate less the weight of the ore car is given, then a sample is taken very carefully,—a moisture sample. That sample is put into a drier and the moisture is removed and from the wet weight and the dry weight the percentage of moisture is determined and settlement is made on the dry ton basis.

Q. Will you please take the instrument handed

(Testimony of Wallace G. Wolf.)

to you by the bailiff which has been marked Exhibit No. 6 for identification [24] purposes, I will ask you what that is, Mr. Wolf?

A. This is a letter addressed to the Sullivan Mining Company from H. DeWitt Smith, executive vice president of the Metals Reserve Company, and it refers to a modification of the original contract for stockpiling zinc concentrate.

Mr. Brown: I offer this in evidence.

The Court: Is there any objection?

Mr. Donahue: No objection.

The Court: It may be admitted.

Mr. Brown, I don't think that we have the date of that, what is that date, Mr. Clerk?

The Clerk: July 12, 1944.

Q. That is the date of Exhibit No. 6, Mr. Wolf?

A. Yes, sir.

The Court: We will recess at this time until 1:45.

November 2, 1953, 1:45 p.m.

Q. Mr. Wolf, just prior to the adjournment at lunchtime we had introduced in evidence the modification letter from Metals Reserve Company dated July 12, 1944, as Exhibit No. 6. That modification letter, Exhibit No. 6, has a provision in it differing from the original contract of [25] June 18, 1942, in that it provides that the Metals Reserve Company could remove from the stockpile, zinc concentrate for processing. I will ask you whether or not, prior to the letter of modification, July 12, 1944, you had any indication from the Metals Reserve Company



(Testimony of Wallace G. Wolf.)

that all or part of those concentrates might be removed for processing elsewhere?

A. No, we did not.

Q. You were aware at the time this modification was executed that there was a provision for allowing the removal of concentrates by the Metals Reserve Company?

A. In the modification, the modification provided for it?

Q. Yes, in the modification?      A. Yes, sir.

Q. And there was not a similar provision in the original contract?      A. No.

Q. The bailiff has handed you four letters, Mr. Wolf, they are marked Plaintiff's Exhibit 7 for identification, I will ask you what they are?

A. These are letters or rather it is an exchange of correspondence between H. DeWitt Smith, executive vice president of the Metals Reserve Company, and the Sullivan Mining Company regarding the matter of low-grade concentrate. Mr. Easton had had telephone [26] conversations with a Mr. Jesse Johnson of the Metals Reserve organization requesting a change in paragraph 4 of the Metals Reserve Company letter of agreement of July 12, 1944, which modified the original stockpile agreement. This first letter is a modification of that said paragraph 4. There follows a letter from Mr. L. E. Hanley who was the president of the Sullivan Mining Company at that time, discussing that modification and asking for a further change to be made. The subsequent letter is from H. DeWitt Smith

(Testimony of Wallace G. Wolf.)

dated August 1, 1944, and it agrees to the suggested changes, and the fourth letter is from Mr. Hanley inclosing copies of their letter with his confirmatory signature.

Q. Will you give the dates of those letters?

A. Yes, the first was under date July 12, no, that is July 20, 1944, and that is from H. DeWitt Smith to the Sullivan Mining Company, the second letter is dated July 24, 1944, addressed to the Metals Reserve Company from the Sullivan Mining Company signed by Mr. Hanley, the third letter is from H. DeWitt Smith, executive vice president of the Metals Reserve Company, addressed to the Sullivan Mining Company, and the fourth is a reply dated August 15, 1944.

Q. The effect of these letters actually is that the modification letter of July 12, 1944, before acceptance was, in one particular at any rate, amended by reason of these [27] letters?

A. Yes, sir, that's right.

Q. And the actual confirmation, the letter of confirmation is the last of the four letters, actual confirmation of the July 12, 1944, agreement?

A. Yes.

Q. And that is dated August 15, 1944?

A. Yes.

Mr. Brown: I offer Exhibit No. 7 in evidence.

The Court: Is there any objection?

Mr. Donahue: No objection.

The Court: It may be admitted.

Q. The bailiff has handed you two letters marked as Plaintiff's Exhibit No. 8 for identification pur-

(Testimony of Wallace G. Wolf.)

poses, I will ask you what that exhibit is, Mr. Wolf?

A. The first is a letter dated August 16, 1944, addressed to the Metals Reserve Company, attention Mr. H. DeWitt Smith, executive vice president, and it is from Mr. L. E. Hanley, president of the Sullivan Mining Company. It sets forth, in the last paragraph "We therefore ask that the provision of the contract limiting monthly zinc concentrate receipts which we may purchase as agent for Metals Reserve Company for its account to 2,000 tons per month be waived", and the earlier part of the letter explains the reason why, [28] shortage of man power, the large receipt of concentrates, and so on, and the reply under date of August 26, 1944, from H. DeWitt Smith, executive vice president of the Metals Reserve Company, has favorably considered the request and asks to return the inclosed confirmation copy. It says "This Company has favorably considered your request and you are hereby advised that until further notice the aforesaid limitation restricting the amount of material to be stockpiled for the account of this Company to 2,000 short tons in any one month is waived."

Q. Mr. Wolf, at that time and as a result of the modification letter and the extensions and the modifications allowed by the Metals Reserve Company which are in evidence, at the time of this correspondence, Plaintiff's Exhibit No. 8, the Sullivan Mining Company had been authorized to stockpile up to 40,000 tons with a maximum receipt per month of 2,000 tons. I notice that in this Ex-

(Testimony of Wallace G. Wolf.)

hibit 8 Mr. Hanley refers to an acute shortage of manpower and the fact that it had become necessary of this acute shortage to close down one unit of your plant, what is the fact as to whether or not that occurred?

A. The zinc plant at that time consisted of three electrolytic units. In the process the zinc is dissolved in a solution, that solution is electrolized in electrolytic cells and the zinc is obtained in an electrolytic deposit. [29] From the three such units at that time because of the shortage of manpower we had to curtail and shut down one unit which in effect cut our output about one third. The shortage was due to the fact that we could not get labor, during that period there was a lot of government work going on in various parts of the country hereabouts, ship building programs on the coast and took a lot of our labor out of the district and because our rates of pay were not as high as the government contract rates the result was that during that period we had great difficulty because of the shortage of manpower. At one period we employed or attempted to employ women which was something that we had never done before on regular operating jobs in the plant, of course, we had women in the office but had never tried them in actual operation. We made various attempts to get increased labor. We employed at one time, I don't recall the exact period, but we employed some internes Italians, they were internes at Missoula, Montana. Most of them were from Italian ships and were pris-



(Testimony of Wallace G. Wolf.)

oners of war at that time. They were permitted to come and we had a number of them come and work for us at one time. And at another time the government released a lot of coal miners to work in the mines to increase the ore taken out of these mines. A number of those coal miners not [30] acquainted with metal mining, and not liking it eventually gravitated to the zinc plant where we employed them. There were several such attempts to obtain labor and during that period there were several instances where we had to curtail to two units.

Q. You mentioned, Mr. Wolf, that there were a number of coal miners released by the government, where were they released from?

A. From the Army.

Mr. Brown: I offer in evidence now Plaintiff's Exhibit No. 8.

The Court: Do you have any objections to this exhibit?

Mr. Donahue: No objections.

The Court: It may be admitted.

Q. The bailiff has now handed you a series of letters marked as Plaintiff's Exhibit No. 9 for identification. I would like you to look at these and state what they are?

A. There are several letters here addressed by the officials of the Sullivan Mining Company to Metals Reserve Company asking for extension of time for stockpiling and increases in the tonnage for stockpiling for the Metals Reserve Company account, the first letter is dated December 5, 1944.



(Testimony of Wallace G. Wolf.)

The reply to that is under date of December 16 by Jesse C. Johnson, chief engineer for the Metals [31] Reserve Company, saying that our request had been referred to the War Production Board for consideration and that they would advise us as soon as decision had been reached.

Mr. Donahue: May I have the date of that letter?

A. Yes, that was December 16, 1944, and that was a letter from Jesse C. Johnson. There is a telegram dated December 30, 1944, from Harvey J. Gunderson, executive vice president of the Metals Reserve Company, and it says "Pursuant War Production Board recommendation MRAA-29 is hereby amended by increasing aggregate amount of material which you are authorized to purchase for our account from 40,000 short tons to 55,000 short tons and by expending effective period of agreement from December 31, 1944, to June 30, 1945, subject to existing cancellation rights. All other terms remain unchanged, please confirm by letter that these amendments are satisfactory."

Q. The whole series of letters, Mr. Wolf, deal with extension of the stockpiling agreement of June 19, 1942, as amended by letter of July 12, 1944, and deal with the extension of time for stockpiling and increase in tonnage?

A. That is right. [32]

Q. The last letter is dated August 2, 1946, I believe?

(Testimony of Wallace G. Wolf.)

A. August 1, there is a letter of August 1, '46, —no,—the last is dated August 2, yes.

Q. And the ultimate effect of this series of letters was to extend the contract to December 31, 1946, and providing finally for the increase of stockpiling up to 80,000 tons?      A. Yes.

Mr. Brown: We offer in evidence these instruments now as Exhibit No. 9, Plaintiff's Exhibit No. 9.

The Court: Do you have any objection?

Mr. Donahue: No objection, your Honor.

The Court: It may be admitted.

Mr. Brown: I see that I have a few more letters extending the contract to 1947.

The Court: Show them to counsel.

Mr. Donahue: Could these be attached to Exhibit 9?

The Court: Attach them and then, Mr. Bailiff, show them to counsel.

Mr. Donahue: No objection, your Honor.

The Court: They may be admitted as attached to Exhibit 9.

Q. Mr. Wolf, during all of the time that I have questioned [33] you about up until 1945, with whom had you been dealing with respect to the stockpiling?

A. With the Metals Reserve Company.

Q. As a part of Exhibit No. 9 there is a telegram addressed to you from Harvey J. Gunderson, executive director office of Metals Reserve, Reconstruction Finance Corporation, and in that tele-

(Testimony of Wallace G. Wolf.)

gram you are advised as follows: "Subject to existing cancellations rights and by substituting",—at any rate, you were instructed to substitute Reconstruction Finance Corporation for the Metals Reserve Company. Now, in the future, from that time forward were you dealing with the Reconstruction Finance Corporation?      A. Yes, sir.

Q. Plaintiff's Exhibit No. 9 shows that your authority for stockpiling for the account of Reconstruction Finance Corporation was extended to June 30, 1947, and that you were limited to finally stockpiling for their account, 80,000 tons of zinc concentrate. Did you stockpile for them up until the expiration of that period?

A. Yes, sir.

Q. What was the total tonnage, Mr. Wolf, if you know, of the concentrates that were actually stockpiled in the name of the Metals Reserve Company and the Reconstruction Finance Corporation?

A. There was something like 72,000 tons, total.

Q. Did you consider that in terms of wet tons or dry tons?

A. I think that was wet tons, probably.

Q. Would that be on the basis of tons as they were received?

A. Yes, I think on the basis of dry tons, it was something like 65,000 tons.

Q. Were they unloaded on a wet tonnage basis?

A. Yes, all of them.

Q. Did they go into the stockpile as wet tons?

A. Yes.

(Testimony of Wallace G. Wolf.)

Q. Mr. Wolf, as part of Plaintiff's Exhibit No. 9 there is a letter addressed to the Sullivan Mining Company from the Reconstruction Finance Corporation under date of August 13, 1946, in which request is made, or inquiry is made as to whether or not you could, at that time, start to process some of these stockpiled concentrates. Had you had any previous request from the Corporation to process any of these concentrates?

A. From the Reconstruction Finance Corporation?

Q. Yes. A. No.

Mr. Donahue: May I ask what exhibit that letter is contained in?

Mr. Brown: No. 9.

Mr. Donahue: And is that letter dated August 13? [35]

Mr. Brown: Yes, it is.

Q. Now, on June 30, 1947, your stockpiling agreement terminated. Did the stockpile of zinc concentrate then remain at your plant,—not at your plant, but as they were stockpiled, did they remain in stockpile?

A. No, they were shipped elsewhere.

Q. When, if you could tell me approximately, were the first of those concentrates removed and shipped elsewhere?

A. There was a tonnage of something like 17,500 tons that were removed to the zinc plant of the Anaconda Copper Mining Company, that was in 1946, I believe, or 1947, I am not sure.

(Testimony of Wallace G. Wolf.)

Q. At whose direction were those shipped out?

A. I am uncertain of the date that was shipped out, I cannot recall——

Q. ——Do you recall what agency directed you to ship them out?           A. The Metals Reserve.

Q. Who supervised the loading out of the concentrates?

A. The zinc plant personnel supervised it.

Q. By the zinc plant personnel do you mean the personnel of the Sullivan Mining Company?

A. Well, we watched the tonnages and told the Bunker Hill Smelter people what bins to remove it from, we kept [36] the record of the tonnage shipped to the Anaconda Copper Mining Company.

Q. Whose facilities were used there?

A. The Bunker Hill smelter facilities.

Q. Were those the same facilities as were used in unloading the concentrates and putting them into the stockpile?           A. Yes.

Q. Now, Mr. Wolf, referring to Exhibit No. 10, will you state very briefly what they are?

A. This is a letter to Morris Levinson, executive director, office of Metals Reserve, Reconstruction Finance Corporation, regarding the zinc contract, this letter is from me as superintendent, telling him how much of the concentrates we were authorized to purchase or that had been authorized to be purchased, 80,000 tons, and that we had purchased 65,100 tons and that we had not purchased any for the Reconstruction Finance Corporation account since November of 1946 and asking if their



(Testimony of Wallace G. Wolf.)

office will continue to stockpile zinc concentrate for its account. There is a reply acknowledging receipt of this letter and advising that no provision had been made for continuing this program after June 30, 1947.

Mr. Brown: We offer this evidence at this time.

Mr. Donahue: We have no objection. [37]

The Court: It may be admitted.

Q. The bailiff has handed you some letters marked for identification as Plaintiff's Exhibit No. 11, I will ask you to state what that exhibit is?

A. The first is a letter under date of February 19, 1948, from George S. Jewett, associate director, office of Metals Reserve. The letter states that the Munitions Board has requested that the zinc metal and the permanent stockpile be made available to them as soon as treatment contracts can be arranged; notifying us that capacity for treatment of those concentrates is available at other smelters and asking if our facilities are not available for treating these, to advise if we were in a position to load the concentrates and the number of cars we could conveniently load per week.

Mr. Donahue: And the date of that letter, please, Mr. Wolf?

A. February 19, 1948. The second is a telegram under date of March 3, 1948, referring to this letter and it says, "Please let us have your reply by wire as to tonnage you can load weekly as we are being pressed by all concerned." That telegram is from George S. Jewett, associate director of the Metals

(Testimony of Wallace G. Wolf.)

Reserve. The third is a reply to him from me under date of March 4, 1948, stating, "Concentrate moving equipment, crews for [38] same, present supply railroad gondola cars now occupied. Study now being made possible availability men, necessary loading equipment and required additional railroad cars. Will advise fully soon as information is available." The final one is a letter under date of March 11, 1948, from me to Mr. Jewett, explaining the situation as to our ability to load out the concentrates, the availability of equipment as the smelter for doing that work, speaking of the shortage of labor and the serious freight car shortage in the district and stating that it would be necessary to have their assistance in obtaining additional freight cars desirable for concentrate shipments. In the last paragraph I state: "When the subject agreement was entered into it was contemplated that the stockpiled concentrates would eventually be processed in our plant which would derive the benefits accruing therefrom, including the processing margin. Since the stockpile concentrates are not to be shipped elsewhere we contend that we should be reimbursed for these substantial out-of-pocket expense of this stockpiling and we trust that you will take appropriate action that we may receive equitable consideration under the circumstances."

Mr. Brown: I now offer Exhibit No. 11 in evidence, if your Honor please.

The Court: Do you have any objection? [39]

Mr. Donahue: No objection.

(Testimony of Wallace G. Wolf.)

The Court: It may be admitted.

Q. Did you receive a reply as to your inquiry or request with the respect to the payment of this out-of-pocket funds?      A. I think we did.

Q. The bailiff has now handed you exhibit marked as Plaintiff's Exhibit No. 12 for identification, and I will ask you what that is?

A. This is a letter under date of April 26, 1948, from George S. Jewett, associate director, office of Metals Reserve, in which he acknowledges my letter of March 11, 1948, and in which he advises me,— he says: "We are pleased to acknowledge your letter of March 11, 1948, in which you advise that you believe it would be possible to load with your present crane crews three cars per day from the stockpile," and so forth, and he says that the material should be moved in open top gondola type cars and that it is contemplated that the movement will commence shortly. And it says they will give us as much advance notice as possible, then it goes on to say: "With regard to the last paragraph of your letter of March 11, 1948, you will recall that this stockpiling program was entered into in connection with absorbing increased production brought forth under [40] the premium price plan, and that stockpiles of this nature were established at various consuming smelters throughout the United States in order to make available to such smelters substantial inventories at no cost other than what might be incurred in receiving and stockpiling the material." Then it goes on: "By amendment it was provided

(Testimony of Wallace G. Wolf.)

that smelters where such stockpiles existed would be reimbursed for actual out-of-pocket cost incurred in connection with removing tonnage from stockpiles, or any purpose other than sales to the smelter at which the stockpiles are located." Then in the next paragraph it states: "In view of this we do not believe we should be called upon to pay any expense for establishing the stockpiles or for unloading materials into the stockpile." And then in the next paragraph: "In connection with the cost incurred from time to time for maintenance of these stockpiles we ask that you kindly prepare a schedule showing the dates on which repairs to the stockpiles were made, giving a slight description of the work performed and actual costs incurred by you for such work. Upon receipt of this schedule we will be pleased to give this matter further consideration."

Mr. Brown: We offer this exhibit in evidence, it is Plaintiff's Exhibit No. 12. [41]

Mr. Donahue: We have no objection.

The Court: It may be admitted.

Q. Mr. Wolf, the bailiff has handed you certain instruments as Plaintiff's Exhibit No. 13 for identification and I will ask you what those are?

A. This is a letter under date of May 4, 1948, addressed to the Sullivan Mining Company, attention W. G. Wolf, authorizing the release and shipment at the rate of three cars per day of 17,322 standard dry tons of star zinc concentrates to the Anaconda Mining Company, giving general instruc-



(Testimony of Wallace G. Wolf.)

tions as to weighing and sampling, handling of documents and so on in connection with it. The next letter is dated May 10, 1948, addressed to George S. Jewett, associate director, office of Metals Reserve, and it is signed by me as superintendent, referring to his letter of April 26, and to the letter of instructions of May 4th. In that letter I pointed out in previous correspondence where I had stated "we" and "our", I corrected it and explained at that time that it was stockpiled on Bunker Hill smelter ground and that all the work had to be done by Bunker Hill smelter crews in connection with the loading out,—with their crews and equipment. They had, in their instructions told us that all the cars had to be track scaled at [42] the Silver King and, of course, Silver King is the site of the zinc plant and the Bunker Hill smelter is at the bottom of the gulch about a mile away and their station is Bradley and that had to be corrected. I explained just how the procedure had to be done, the cars had to be loaded from stockpile and passed over the Bunker Hill smelter scales; stating at that time that the smelter had informed us that there would be a cost of 10 dollars per car to cover that expense and that it would be in addition to the 40 cents per ton under the present labor costs and conditions for the Bunker Hill to load the material,—stating that the modification of the procedure as authorized by him be made accordingly. Going on to say that we would make every effort to load and ship according to schedule but going on to point



(Testimony of Wallace G. Wolf.)

out the shortage of labor and equipment that the Bunker Hill smelter had, then on the last page of my letter I referred to his letter of April 26, and I quoted from his letter: "With regard to the last paragraph of your letter of March 11, 1948, you will recall that this stockpiling program was entered into in connection with absorbing increased production brought forth under the premium price plan, and that stockpiles of this nature were established at various consuming smelters throughout the United States in order to make [43] available to such smelters substantial inventories at no cost other than what might be incurred in receiving and stockpiling the material." And I am still quoting in my letter from his letter of April 26: "By amendment, it was provided that the smelters where such stockpiles existed could be reimbursed for actual out-of-pocket costs incurred in connection with removing tonnage from stockpile, for any purpose other than sale to the smelter at which the stockpile was located." Still quoting from his letter: "In view of this we do not believe we should be called upon to pay any expense for establishing stockpiles or for unloading materials into the stockpiles." Then my letter continues as follows: "This company entered into the stockpile agreement AA-29 as a war time action because of consideration of national security and with every supposition and belief that the stockpiled zinc concentrate would be processed eventually at this plant. This is stressed and emphasized in the first para-

(Testimony of Wallace G. Wolf.)

graph of your letter quoted above. We consider, therefore, now that these concentrates are to be shipped elsewhere, that your decision above quoted is inexcusably arbitrary and high-handed and a gratuitous imposition on the company's cooperation that prevailed during the time of national crisis, and we believe that the Reconstruction Finance Corporation, [44] as a responsible government agency, cannot hold itself aloof from that aspect of the matter but should reimburse this company for expense incurred in stockpiling. We believe that the matter deserves a more realistic attitude, one that is fair and equitable, and we hope that your decision may be reconsidered accordingly." That letter was signed by me as superintendent.

Mr. Brown: I offer Exhibit No. 13 in evidence.

The Court: Is there any objection?

Mr. Donahue: No objection.

The Court: Then it may be admitted.

Q. The bailiff has handed you exhibit marked as Plaintiff's Exhibit No. 14 for identification, and I will ask you, Mr. Wolf, what that is?

A. This is a letter under date July 1, 1948, from the Reconstruction Finance Corporation office of Metals Reserve, signed W. F. McKinnon, deputy director, office of Metals Reserve. It refers to the last paragraph of,—this letter is addressed to me as superintendent and it refers to the last paragraph of a letter from us of May 10, 1948, requesting further consideration to be given to reimbursing the company for expenses incurred for stock-

(Testimony of Wallace G. Wolf.)

piling material accumulated under the present [45] agreement. It points out in the second paragraph as follows: "On August 13, 1946, we wrote to you asking if you were in a position to treat these concentrates for our accounts and the tonnage you would be in a position to handle each month. On August 20, 1946, you replied that because of a shortage of labor, and also as you had approximately 10,700 tons of material in your own stockpile, you would be unable to handle any of our material at that time, but that you might be able to consider purchasing some of the material in the fall. On September 16, 1946, we advised that under present regulations we could sell only on CPA recommendations to meet deficiencies and again stated that we would like for you to treat the concentrates on a toll basis under which we would pay treatment charges and receive the resulting zinc metal.

"As conditions over which we have no control changed we had no alternative but to declare the stockpile of zinc concentrate to the Munitions Board for inclusion in the permanent stockpile and on February 19, 1948, we wrote to you asking if you could treat all or a part of the stockpile and requested a prompt reply as we were being pressed to place the zinc metal in permanent stockpile, and advising that there was smelter [46] capacities available elsewhere. Not having received a reply, we wired you on March 3, 1948, and then received your letter of March 11, 1948, advising that your plant capacity was being utilized fully for treat-

(Testimony of Wallace G. Wolf.)

ment of zinc concentrate being tendered to you in the usual manner, and in this letter you raised the question of reimbursement to you for expenses incurred in receiving and stockpiling the material.

“From the above we believe that it is clear you were given ample opportunity to arrange for processing of the material at your plant. As we advised in our letter of April 26, 1948, stockpiles of this nature were established at various consuming smelters throughout the United States and we have not been requested to reimburse any of these smelters for expenses incurred in receiving and stockpiling such materials.

“From time to time smelters where these stockpiles were established have recommended certain repairs to the stockpiles in order to preserve the material and we have given every consideration to these requests for maintenance costs.

“As we advised you in our letter of April 26, 1948, we would be pleased to give consideration to any similar expenses you have incurred in connection with these stockpiles if you would kindly furnish us a [47] schedule giving a slight description of the work performed and the actual cost incurred by you in making such repairs.

“We are very pleased to know that the material is now being loaded and shipped out of your plant. The zinc metal resulting from the treatment of this material is, as we stated before, going to a permanent stockpile in accordance with instructions issued by the Munitions Board.”



(Testimony of Wallace G. Wolf.)

Mr. Brown: We offer Plaintiff's Exhibit No. 14 in evidence.

Mr. Donahue: No objection, your Honor.

The Court: It may be admitted. We will take a recess for fifteen minutes at this time.

November 2, 1953, 3:10 o'clock, p.m.

Q. Mr. Wolf, the bailiff has handed you what has been marked for identification as Plaintiff's Exhibit No. 15, I will ask you what that is?

A. This is a letter under date of July 9, 1948, signed by T. J. Doherty, assistant traffic manager, office Metals Reserve, and it is addressed to me as superintendent of the Sullivan Mining Company Zinc Plant. It discusses the switching charge of \$10.00 per car and concerns the [48] weighing on track scales and shipments and so on. There is my reply, that is under date of July, 1948, July 28, 1948, mentioning that the letter had been delayed because I had to get authorization and advice from the Bunker Hill smelter concerning these specific subject matters explaining the charge and in conclusion I said: "I feel, considering the amount of work involved and the inconvenience to our own operation, that \$10.00 per car for engine service is a very reasonable charge and we shall continue to make the charge." That was in accordance with a memo from Mr. Federson to me, substantiating that charge of \$10.00 per car for switching.

Mr. Brown: We offer Exhibit No. 15 in evidence.

Mr. Donahue: We have no objection.



(Testimony of Wallace G. Wolf.)

The Court: It may be admitted.

Q. Referring specifically to Exhibits No. 13 and 15 which relate primarily to shipping instructions from the Reconstruction Finance Corporation with respect to the methods of shipment of concentrates to the Anaconda Copper Mining Company, did you ship the concentrates in accordance with those instructions?

A. We did. I stated in my previous testimony that the shipment was made to Anaconda in 1946, in reality it [49] was made in 1948.

Q. Was that through the approximate periods of these shipping instructions or shortly thereafter?

A. Yes.

Q. Is that the 17,500 tons, or approximately, that that you referred to before, that was shipped out?

A. Yes, sir.

Q. That was all shipped in 1948?

A. Yes, sir.

Q. At or about that time, or shortly thereafter, in 1948 were any other concentrates shipped out to the Anaconda Copper Mining Company?

A. After the termination, after we could no longer store for the Metals Reserve account there was a large tonnage of zinc concentrates offered to us in excess of our capacity to treat and by arrangement with the shippers we received as much from them as we possibly could and the balance we put in a stockpile, which we called the shippers' stockpile, and we made arrangement to ship that stockpile to the Anaconda under contract. We paid the

(Testimony of Wallace G. Wolf.)

shippers to us, the same amount as we received from the Anaconda except that we absorbed the freight from Bradley, the site of the stockpile to the Anaconda Company, something like \$6.00 per ton. We paid that. [50]

Q. Was the amount of shipment that you were then receiving from the shippers in excess of your own smelting capacity and in excess of the amount that go into the government stockpile monthly?

A. Yes, as I recall we shipped in excess of 11,000 tons to the Anaconda Company. That was in addition to and had nothing to do with the 17,500 tons that we shipped from the Metals Reserve stockpile.

Q. The 11,000 tons was not concentrates of the Reconstruction Finance Corporation?

A. No.

Q. Were they concentrates you yourself, that is, your company had purchased?

A. We purchased them by agreement with the Producers, with the understanding that we would be able to dispose of them to the Anaconda Company and we did dispose of them to the Anaconda Company. The object was to maintain the mines in production.

Q. You were not stockpiling any concentrates for the Reconstruction Finance Corporation at that time?

A. No, sir.

Q. Were you stockpiling any after June 30, 1948?

(Testimony of Wallace G. Wolf.)

A. That was the termination of the stockpiling for the government. [51]

The Court: Did you mean June, 1947, or 1948?

Mr. Brown: June 30, 1947.

Q. So that the additional eleven thousand and some odd tons that you shipped on your own account out of your own stockpile in 1948, I asked, those were your own concentrates, is that correct?

A. Not out of our own stockpile, it was stockpile that accumulated for the shippers account. They were producing and we stockpiled them because they didn't have any facilities to stockpile on their own premises. It was stockpiled with the understanding that we would be able to ship the concentrates to Anaconda. I made arrangement with the Anaconda to ship the concentrates and we did ship them under contract with the Anaconda and the shippers were paid on the basis of the schedule of payment from the Anaconda with the exception that we absorbed the freight from the shippers stockpile to the Anaconda, that is from the Bunker Hill smelter to the Anaconda Company. The freight was something in excess of \$6.00 per ton. Sullivan Mining Company absorbed that.

Q. Mr. Wolf, I refer now to Plaintiff's Exhibit No. 14 that you examined a few minutes ago and was admitted in evidence, it is dated July 1, 1948. That is, where [52] the Reconstruction Finance Corporation in its letter to you advised that at some smelters they had given consideration to the cost of maintaining the stockpiles at smelters and

(Testimony of Wallace G. Wolf.)

in the letter advised you that they would give consideration to the cost that you might have had with respect to maintaining such stockpiles and would be pleased to consider that for you. As a result of that I will ask you if you prepared such a statement?      A. I did.

Q. Now, Mr. Wolf, the bailiff has handed you an exhibit marked as Plaintiff's Exhibit No. 16, I will ask you to state what that is?

A. That is a letter under date of July 15, 1948, to the Reconstruction Finance Corporation, written by me, referring to their letter of July 1, 1948, in which they stated what you have, in substance, just stated in your question, about making repairs and maintenance of the stockpiles, and so forth, and telling them: "In accordance with the foregoing we have prepared such a schedule which is submitted herewith with the following explanation" and then I went on explaining just how the stockpiling was done and how the cost of building up the stockpiles was incurred and stating that this stockpiling had been done by the Bunker Hill smelter and [53] some of that stockpiling had been done for concentrates that had been placed in the Sullivan Mining Company stockpile and some of them in the government stockpile and that the smelter's cost, didn't in their statement to us, that they simply gave us the over-all cost for the entire works and that we were compelled to allocate it in accordance with the respective tonnage stored by the Bunker Hill smelter and the Sullivan Mining Company and

(Testimony of Wallace G. Wolf.)

for the account of Metals Reserve and pointing out that these costs were apportioned accordingly as shown on the statement.

Q. And attached is there a part of that exhibit, a response to the letter or the statement?

A. Yes, a letter under date of July 30, 1948, addressed to the Sullivan Mining Company, attention W. G. Wolf, superintendent, from the Reconstruction Finance Corporation, and signed W. F. McKinnon, deputy director office of Metals Reserve. It says: "Reference is had to your letter of July 15, 1948, submitting a schedule of costs totaling \$37,273.07 incurred by you in connection with stockpiling zinc concentrate. Of this amount you have allocated to the materials stockpiled under the subject agreement the total of \$27,310.29." Then they go on and state that they had reviewed the schedule submitted but they could not agree to reimburse us, and going on [54] to state that Mr. Leo J. Coady is their field representative and that he would be in the vicinity of Kellogg within the next few weeks, and also stating that he was familiar with the stockpiles as established with the other smelters and that he would call on us in connection with the matter.

Mr. Brown: I now offer in evidence Plaintiff's Exhibit No. 16.

Mr. Donahue: No objection.

The Court: It may be admitted.

Q. Mr. Wolf, I will ask you to refer to Plaintiff's Exhibit No. 16 which has now been admitted,



(Testimony of Wallace G. Wolf.)

will you state what was the total cost figure shown there for the maintenance of all concentrates stock-piled at that time?

A. This statement shows \$32,773.07.

Q. How much of that was allocated to the Reconstruction Finance Corporation?

A. \$27,310.20. On this basis, there was stored for Metals Reserve 65,501 tons and for the Sullivan Miling Company 13,101.9 tons, for a total of 78,603, and allocating on the basis of cost the tons totaled in amounts for the Metals Reserve \$27,310.29, for Sullivan \$5,462.78, making a total of \$32,773.07.

Q. Have you taken an arbitrary cost per ton for this? [55]

A. No, it was based on our invoices that we received and paid to the Bunker Hill smelter for their costs. We had paid those amounts over the various periods of time.

Q. And did that include the cost of lumber?

A. It included smelter costs, lumber cost, in fact, the total cost.

Q. Let me ask you, did that statement include the cost paid by your company to the Bunker Hill for the use of its locomotive and crane in the unloading of concentrates?

A. No, I don't think so, I think in this segregation the smelter cost simply was the cost of lumber for building bins.

Q. And you show Bunker Hill smelter cost,—you mean by that, that related only to the lumber cost on the bins?

A. Yes.

(Testimony of Wallace G. Wolf.)

Q. And you did not show here the crane cost for the actual unloading cost to you?

A. That is my understanding.

Q. Now, on the tonnage basis you refer to 65,501.26 tons, were you referring to wet tons or dry tons?      A. I think that was wet tons.

Q. You understand, Mr. Wolf, in making this statement you were referring only to the maintenance cost?

A. The fact is that we stored for Metals Reserve 65,501 tons [56] as dry tons, the total that we stored for the Metals Reserve was 72,000 tons.

Q. So that this statement was based on dry tons?

A. That is right, dry tons.

The Court: Was it 72,000 even or was it 72,603 tons?

A. There was an odd figure, I don't recall the odd figure.

Q. Referring to Plaintiff's Exhibit No. 16, Mr. Wolf, the second letter attached as a part thereof is in answer to your letter and statement, and is from the Reconstruction Finance Corporation, and there is a reference in it to the fact that Mr. Leo J. Coady will call upon you in connection with this, did he visit your plant?

A. Yes, sir, shortly thereafter Mr. Coady came to Kellogg. As I recall, he came to the office of Mr. Haffner and Mr. Haffner, I and Mr. Federson, superintendent of the Bunker Hill smelter, discussed with Mr. Coady, in Mr. Haffner's office,—Mr. Haffner told Mr. Coady—

(Testimony of Wallace G. Wolf.)

Q. —What was said back and forth, just relate in a general way what he did, Mr. Wolf?

A. There was a discussion in the office and following that Mr. Federson and I took Mr. Coady over the ground there, where the concentrates were stockpiled and we showed him the railroad trackage, the method of loading [57] and unloading into the stockpiles. He looked over the stockpiles in various parts of the smelter grounds. That was late in the evening and Mr. Coady came out to the zinc plant office the next day and went into our records. We showed him how we had kept the records for the premium price payments,—how that had been paid, and he looked into our books and went over the whole record regarding those stockpiles and the matter of stockpiling. He then said that he wanted to see some of the cars unloaded or loaded from the stockpile, we had not been able to see that the previous night because he had gone down there late after the workmen had quit. We arranged for him to go down, we didn't go with him, as I recall, but Mr. Coady went down and saw that and then he left the district.

Q. Did you spend all of the time that he wished you to with him for the period of two days?

A. Oh, yes, he was satisfied, he had gotten all of the information that he wanted.

Q. The bailiff has handed to you letters marked as Plaintiff's Exhibit No. 17 for identification, I will ask you what they are, Mr. Wolf?

A. This is a letter under date October 22, 1948.

(Testimony of Wallace G. Wolf.)

It is addressed to the Sullivan Mining Company from Reconstruction Finance Corporation, office of War Activity [58] Liquidation, and it is signed T. J. Doherty, chief stockpile branch, informing that all of the concentrates in the Silver King stockpile has been accepted by the Munitions Board for the permanent stockpile. And it says: "As you know, we have been shipping concentrates from this stockpile to the Anaconda Copper Mining Company for treatment and delivering the resultant metal to Treasury Department, Bureau of Federal Supply, for stockpile under instructions of the Treasury Department, Bureau of Federal Supply. It has now been agreed that we shall transfer physical custody of the entire government stockpiles of zinc concentrates stored at Silver King to Treasury Department, Bureau of Federal Supply, effective at the end of business October 31, 1948.

"In this connection it is proposed that our contract dated June 18, 1942, as amended, be taken over by Treasury Department, Bureau of Federal Supply, at the close of business, October 31, 1948. We will furnish you a preliminary release to Treasury Department, Bureau of Federal Supply, for all material remaining in stockpile at the end of business, October 31, 1948, and will cancel our shipping instructions effective on that date. It is anticipated that Treasury Department, Bureau of Federal Supply, will request new storage documents, covering the material remaining in stockpile [59] and, upon receipt of such documents by Treasury



(Testimony of Wallace G. Wolf.)

Department, Bureau of Federal Supply, your storage certificate now held by Reconstruction Finance Corporation will be returned to you.

“From November 1, 1948, you would look to Treasury Department, Bureau of Federal Supply, for shipping instructions and for payment of all invoices covering the services rendered to it.

“If you will agree with this proposed procedure, please advise and the pertinent details can be arranged to our mutual satisfaction.” That is signed, as I said, by Mr. T. J. Doherty.

Attached thereto is a letter under date October 27, 1948, addressed to the Office of War Activity Liquidation, Reconstruction Finance Corporation, Washington, D. C., attention Mr. T. J. Doherty, and we state that the procedure set forth in their letter is satisfactory, and then in the last paragraph we state: “In this connection we wish to state that we still maintain our position concerning proper reimbursement for our costs incident to the stockpiling of these concentrates.” And the letter is signed by me as superintendent.

Mr. Brown: We offer Exhibit No. 17 in evidence. [60]

Mr. Donahue: We have no objection to that.

The Court: It may be admitted.

Q. The bailiff has handed you two documents marked as Plaintiff's Exhibit No. 18 for identification, and I will ask you what those are?

A. The first is a letter under date November 1, 1948, addressed to the Sullivan Mining Company,



(Testimony of Wallace G. Wolf.)

Kellogg, Idaho, and for my attention, it is from the Reconstruction Finance Corporation, Office of War Activity Liquidation, and this letter says in reference to our letter of October 22, 1948, and the reply of October 27 that it was impossible,—they advised us that it was impossible to complete the transfer of the zinc concentrate stockpiles effective October 31, 1948, and advising us that we would proceed under the outstanding instructions until further advised. And in the last paragraph it says: “The tentative date for the transfer has now been set forward to the end of business November 30, 1948, and you will hear from us further if the transfer can be accomplished by that date.”

The second letter is under date November 9, 1948, from the Reconstruction Finance Corporation, Office of War Activity Liquidation, and it is addressed to the Sullivan Mining Company, announcing that all of the [61] concentrates which you are holding at Silver King, Idaho, for the account of this corporation have been declared to and accepted by the Munitions Board for the permanent stockpile. As you know, the material accepted for the permanent stockpile is placed under the custody of the Treasury Department, Bureau of Federal Supply,—and then in the next paragraph it says: “Accordingly you are requested to accept this letter as a release of all material remaining in stockpile to Treasury Department, Bureau of Federal Supply, effective as of the close of business November 30, 1948. In accordance with the above, all charges in-

(Testimony of Wallace G. Wolf.)

curred in connection with this material will be for the account of and you will bill such charges to Bureau of Federal Supply, effective as of December 1, 1948. Our legal division is arranging to sign the underlying contract involved in this storage operation." Telling us where the correspondence is to be addressed, and it states further: "You are requested to advise Mr. Johnson of the quantity of material that remains in the stockpile as of the close of business November 30, 1948." Then in the following paragraph they state: "It is our understanding that the Treasury Department, Bureau of Federal Supply, will request you to issue new storage documents in their name for the quantity [62] of material that remains in the stockpiles at the close of business November 30, 1948. But in the meantime, the original storage documents issued by you covering the material will be held by this corporation for the account of Bureau of Federal Supply."

Then it goes on in the following paragraph: "Our shipping instructions dated May 4, 1948, shipping release No. 5081, covering 17,322 short dry tons of this material are cancelled hereby, effective as of the close of business November 30, 1948, and it is our understanding that the Bureau of Federal Supply will reissue shipping instructions covering the material as they desire. We ask that you indicate your understanding and acceptance of the above by signing and returning the attached copy of this letter."

Mr. Brown: We offer this exhibit in evidence.

(Testimony of Wallace G. Wolf.)

Mr. Donahue: No objection.

The Court: It may be admitted, the fact is that the statement was that the custody of the stockpile would be transferred to the Federal Bureau of Supply on October 31, 1948, the actual custody,—the physical custody was not taken over until November 30, 1948, is that correct?

A. That is right. [63]

Q. That was a result of Exhibit No. 18?

A. Yes, sir.

Q. And in the meantime, you had been shipping concentrates at the direction of the Reconstruction Finance Corporation?

A. Yes, sir, approximately 17,500 tons to the Anaconda Copper Mining Company.

Q. The bailiff has handed you Plaintiff's Exhibit No. 19 marked for identification, and I will ask you what that is?

A. That is a letter from the Reconstruction Finance Corporation, Office of War Activity Liquidation, under date of November 18, 1948, and it is addressed to the Sullivan Mining Company concerning shipping release No. 5580 pointing out in the second paragraph: "Our records indicate that this shipment has not been completed and we have a letter from the Anaconda Copper Mining Company advising that they received less than 1,100 tons of concentrates during the month of October against our instructions to ship 3,000 tons per month. We request that you make every effort to ship at least 3,000 tons during the month of Novem-

(Testimony of Wallace G. Wolf.)

ber and, in order that there will be no stoppage in the shipment, you are authorized to ship up to 3,000 tons against shipping release 5580, during the month of November and under the [64] same general instructions as outlined in our letter of May 4, 1948. Your cooperation in maintaining the shipping schedule during the month of November will be very much appreciated. You will, of course, observe our instructions in our letter of November 9, 1948, as to the cancellation of these instructions at the close of business November 30, 1948." The second letter is dated November 22, 1948, and is my reply to the letter from which I have just quoted, and it is addressed to the Reconstruction Finance Corporation, Office of War Activity Liquidation, Washington, D. C., pointing out the reasons why the shipment, during the month of October, had not been made,—it was attributable to a periodic hard lead run by the Bunker Hill smelter, the equipment of which was engaged in that activity and could not load out the concentrates or as much of it, and in the next paragraph which is the third paragraph of this letter it is stated: "As of today, 12 cars of your concentrates have been shipped in November. As closely as we can estimate on a as-loaded or wet tonnage basis eleven additional cars will result in approximately a total shipment of 17,322 short dry tons authorized by your shipping release No. 5580. Mr. Fedderson, Bunker Hill smelter general superintendent, advises me that he will try to ship these remaining eleven cars [65] before November 30."



(Testimony of Wallace G. Wolf.)

Mr. Brown: We offer in evidence Exhibit No. 19 at this time.

Mr. Donahue: We have no objection.

The Court: It may be admitted.

Q. By Exhibits No. 17 and 18 you were notified that the Reconstruction Finance Corporation was delivering the physical custody of this stockpile to the Federal Bureau of Supply. Did you subsequently hear from the Federal Bureau of Supply?

A. Yes.

Q. Handing you a series of telegrams which have been marked Plaintiff's Exhibit No. 20 for identification, I will ask you what they are?

A. This is a series of telegrams; the first is dated November 18, 1948, from J. E. Salisbury, chief storage and transportation division, Bureau of Federal Supply, Washington, and it is as follows: "Relet to you from RFC dated November 9, 1948, concerning transfer of physical custody zinc concentrate now held by you at Silver King, Idaho. It is understood that you are agreeable to service above material for account Bureau of Federal Supply on same basis as in effect with RFC. Please confirm immediately so that appropriate service agreement may be forwarded to you for execution." [66] On November 19, 1948, a telegram to Mr. Salisbury as follows: "Reurtel 18th. We are agreeable to service stated concentrates for account Bureau of Federal Supply on same basis as in effect with RFC." The next is a telegram dated January 10, 1949, addressed to the Sullivan Mining Company,



(Testimony of Wallace G. Wolf.)

Kellogg, Idaho, from H. C. Maull, Jr., Bureau of Federal Supply, Washington, D.C., and is as follows: "Reurtel November 19, 1948. Storage and servicing zinc concentrates at Silver King, Idaho, account of Bureau of Federal Supply same basis as in effect Reconstruction Finance Corporation. Offer accepted. Contract S.C.M.-TC-12755 follows." The next is a telegram dated January 13, 1949, addressed to the Sullivan Mining Company: "Reference storage agreement now in preparation covering approximately 48,000 tons zinc concentrate stockpiled at Silver King, Idaho, to which we have assigned contract No. SCM-TS-12755. Please advise whether a flat rate cost per ton in and a flat rate cost per ton out inclusive of weighing on inbound and outbound in accordance with standard commercial practice would be satisfactory to your company and advise by wire the rate for such services." That is from J. E. Salisbury. The next is a telegram dated January 14, 1949. It is addressed to J. E. Salisbury and is sent by me as superintendent and is as follows: [67] "Reurtel January 13. Our total cost for stockpiling 65,000 tons zinc concentrates at Silver King, Idaho, were 84 cents per ton. Our costs for loading out approximately 17,000 of these concentrates for shipment to the Anaconda Copper Mining Company for account of Reconstruction Finance Corporation was 40 cents per ton plus \$10.00 service charge per car of approximately 50 tons or a total of 60 cents per ton. On basis these past actual costs a charge of 85 cents per ton

(Testimony of Wallace G. Wolf.)

in and a charge of 60 cents per ton out would be agreeable for the present existing stockpiles.”

Mr. Brown: We offer that exhibit,—Plaintiff’s Exhibit No. 20 in evidence.

Mr. Donahue: We have no objection.

The Court: It may be admitted.

Q. Subsequent to this exchange of telegrams as shown by Plaintiff’s Exhibit No. 20, did the Federal Bureau of Supply submit a formal contract to you?      A. Yes, they did.

Q. You have been handed a letter marked Plaintiff’s Exhibit No. 21 for identification, I will ask you what that is?

A. This is a letter dated February 3, 1949, addressed to the Sullivan Mining Company, Kellogg, Idaho, and signed by Raymond Eberly, and typed under that signature is [68] H. C. Maull, Jr., Chief Purchase Division, and it reads: “Subject: Contract SCM-TS-12755. Enclosed are three copies of a formal contract embodying the agreement made with you under the above contract number.

“It is requested that all three copies of the enclosed contract be executed by an authorized official of your firm, indicating clearly his title and the date of execution, by signing the first page. In the event any changes in the document as written appears to be necessary, please communicate immediately with the Purchasing Agent of this Division with whom you have been negotiating.

“Upon return to this office of the three copies of the contract properly executed by you, they will

(Testimony of Wallace G. Wolf.)

be executed on behalf of the Government and one fully executed copy returned to you for your record." Attached to it is a copy of the contract.

Mr. Brown: I offer Exhibit No. 21 in evidence.

The Court: Do you have any objection?

Mr. Donahue: No objection.

The Court: It may be admitted. We will take a recess at this time until 10 o'clock in the morning.

November 3, 1953, 10 o'clock a.m.

Mr. Donahue: I think, if the Court please, that both sides or rather either side has a right to object to any of this documentary evidence as to its relevancy. At this time, with the Court's permission, I would like to withdraw my acquiescence to the admission of Exhibit No. 21 and I want to object to it on the ground that it is incompetent, irrelevant and immaterial.

The Court: I will grant that request and I will take your objection under advisement. When I finally act on this entire case I will either act upon this objection made now or I will just let the matter stand in the record.

Mr. Donahue: I might say to the Court, at this time, that the reason for the objection as to Exhibit No. 21 is that it is a contract that was sent to the Sullivan Mining Company by the Bureau of Federal Supply or the general services administration and I feel, that in view of the fact that the only defendant in this case is the Reconstruction Finance Corporation that this contract, which by the way, was never executed, it becomes absolutely incompetent

(Testimony of Wallace G. Wolf.)

as regard to the issues and the parties involved in this litigation. [70]

The Court: I will let it stand in the record, subject to your objection, of course, it appears to me that perhaps this matter ends about November 22, 1948, I should say October 22, 1948. It appears to me now that all of this material was stockpiled prior to October 22, 1948, and I doubt very much that any negotiations except for the settlement, after, would be material in this case. You understand, however, and I want to make it clear to counsel for both sides that I am not ruling on this at this time.

Q. Mr. Wolf, I would ask you if prior to the receipt by your company of Exhibit No. 21, had you received any type of assignment from the Reconstruction Finance Corporation?

A. Yes, we had.

Q. The bailiff has handed you some documents which have been marked as Plaintiff's Exhibit No. 22 for identification, I will ask you what they are?

A. This first is a letter dated December 21, 1948, and is signed by T. J. Doherty, Chief Stockpile Branch of the Reconstruction Finance Corporation, Office of War Activity Liquidation. It is addressed to the Sullivan Mining Company and it says: "Enclosed herewith please find counterpart of assignment executed as of November 30, 1948, by Reconstruction Finance Corporation and [71] accepted and agreed to under date of December 1, 1948, by United States of America, Treasury Department,



(Testimony of Wallace G. Wolf.)

Bureau of Federal Supply. You will note the assignment covers the captioned contract as amended between Metals Reserve Company and yourselves. Please acknowledge receipt of this instrument, which you may retain for your files. As you have been heretofore informed by us, the assignment was made in connection with the transfer to the Bureau of Federal Supply of certain material held in storage by you under said contract." On December 27, 1948, I replied to the letter of December 21, 1948, which I just quoted from and acknowledged the receipt of the letter with the enclosure of the counterpart of the assignment.

Q. Is there another instrument attached?

A. Yes, attached to it is the assignment.

Mr. Brown: I offer Plaintiff's Exhibit No. 22 in evidence, if the Court please.

Mr. Donahue: We have no objection.

The Court: It may be admitted.

Mr. Brown: I would like to have your Honor look at the assignment which raises one of the important points in this suit. I refer to the last paragraph. [72]

Q. After the receipt by your company of Exhibit No. 21 which was the tendered contract of the Federal Bureau of Supply, did your company ever execute that contract? A. No.

Q. Do you recall whether there was any correspondence back and forth in connection with the matter of your signing it or why you were not signing it? A. Yes, there was.



(Testimony of Wallace G. Wolf.)

Q. The bailiff has now handed you some documents which have been marked Plaintiff's Exhibit No. 22 for identification, will you state what they are?

A. Yes, the first is a letter under date of March 4, 1949, from the Bureau of Federal Supply and signed by Raymond Eberly and typed under that name is H. C. Maull, Jr. Referring to storage contract SMC-TS-12755 and stating: "On January 10, 1949, this office sent a telegram addressed to the Sullivan Mining Company, Kellogg, Idaho, reading as follows: "Reurtel November 19, 1948, storage and servicing zinc concentrates at Silver King, Idaho, account of Bureau of Federal Supply, same basis as in effect Reconstruction Finance Corporation, offer accepted. Contract SMC-TS-12755 follows." Then it states that on February 3, 1949, three copies of a formal contract were mailed to the Sullivan Mining Company. Then, the last paragraph: "Upon return to this office of the three [73] copies of the contract properly executed by you, they will be executed on behalf of the Government and one fully executed copy returned to you for your record." The second instrument is a letter dated March 7, 1949, addressed to the Treasury Department, Bureau of Federal Supply, and is signed by me as superintendent. It is in reply to the letter of February 3, 1949, enclosing three copies of the formal contract and it states in the second paragraph: "It is our interpretation of this contract that the Government is willing to reimburse us for the in-han-

(Testimony of Wallace G. Wolf.)

dling which was incurred on such material and which has recently been shipped out and that we presume that this applies not only to the material that will be shipped out from now on but also to the material that was shipped out from the stockpile during 1948." Then I go on in the last paragraph: "With reference to Item 14, title of property, we wish to advise that these concentrates are not stored on the property of this company but on the property of the Lead Smelter of the Bunker Hill and Sullivan M and C Company of which company ours is a subsidiary. The location of our plant is in a rather narrow gulch without ground space for such storage. The arrangement for storage on the property of the Bunker Hill was explained [74] and agreed to by the Metals Reserve at the time the original agreement was entered into. Your agency can be assured by the Bunker Hill and Sullivan M and C Company that the Government will have peaceful possession of stated zinc concentrates as required by Article 14 of the contract." The third is a letter under date of March 15, 1949, addressed to the Sullivan Mining Company signed by H. C. Maull, Jr., of the Bureau of Federal Supply, in which reference is made to my letter of March 7, 1949, relative to the delay in returning the subject contract and interpretation of certain articles of the contract. Stating in the second paragraph: "In reference to paragraph No. 2 of your letter the interpretation is correct, except that all charges incident to storage and handling of this material in

(Testimony of Wallace G. Wolf.)

and out of storage on and after December 1, 1948, are for the account of Bureau of Federal Supply.” And then in the third and fourth paragraph of the letter they simply go on to state that the fact that the material was on the property of Bunker Hill and Sullivan Mining and Concentrating Company was all right. The final instrument is a letter dated March 24, 1949, to the Treasury Department, Bureau of Federal Supply, signed by myself as superintendent, and acknowledging receipt of their letter of March 15 and referring to the second [75] paragraph it says: “With reference to paragraph two of your letter, we incurred charges incident to the storage and handling of this material prior to December 1, 1948, as well as after December 1, 1948. When the Bureau of Federal Supply took over the assets of the Reconstruction Finance Corporation it also took over its liabilities and obligations. By the statement referred to in your letter you agree on the principle but applying it only after December 1, 1948. This same principle should apply also for the expenses incurred by this company prior to December 1, 1948. We would like to have the equity of the principle of storage charges clearly established before executing the copies of the contract and returning the same to the Bureau as requested by you.”

Mr. Brown: We offer Exhibit No. 23 in evidence at this time, if the Court please.

Mr. Donahue: Now, if the Court please, at this time the defendant Reconstruction Finance Cor-

(Testimony of Wallace G. Wolf.)

poration objects to the admission of Plaintiff's Exhibit 23 which consists of a series of letters and replies between the Sullivan Mining Company and the Treasury Department, Bureau of Federal Supply. All of this correspondence is dated in the month of March, 1949, which is several months subsequent to the date [76] when the Reconstruction Finance Corporation, by virtue of Exhibit No. 22 assigned all of its interest in this contract and the amendments thereto to the Treasury Department, Bureau of Federal Supply, therefore, I believe that it becomes immaterial to this case. This objection is raised and presented upon the further grounds that this is an action in which the Sullivan Mining Company is the plaintiff and the Reconstruction Finance Corporation, a corporation organized and existing under and by virtue of the laws of the United States Government, is defendant. I feel, or rather I want to state my view, that all of this correspondence which refers to negotiations between the Treasury Department, Bureau of Federal Supply, and the plaintiff is entirely irrelevant to the issues in the case that is being tried in this Court between the Sullivan Mining Company and the Reconstruction Finance Corporation.

The Court: Haven't you made it an issue by your answer? I will study that out later. I will overrule the objection at this time and admit the exhibit, however, I am doing so because this being a Court case I have control of it and I will strike it on my own motion if I find it is not admissible.



(Testimony of Wallace G. Wolf.)

The idea occurs to me that all of the dealings, that is, so far as the money that the plaintiff might be entitled to, all of [77] the dealings seem to have been prior to October 22, 1948, and all of this money was earned, if it was earned at all, prior to that date. You say if there was an obligation there it was assumed under the assignment of the contract. This testimony goes to show that if it was assumed, the plaintiff here never released Reconstruction Finance Corporation from the obligation. I may not have it clear at this time but that is the way it looks to me now and I think that you appreciate that I am going to have a great deal of work to do here after you gentlemen get through. I have not taken time to read any of these exhibits, I have only listened to this witness explain them and quote at some length from the exhibits, I will have to read these and I felt that having control that I could reconsider some of these matters more fully. Had I had a jury here I would have ruled more cautiously. I think you may proceed now, Mr. Brown.

Q. As a result of this correspondence, did your company sign the contract?      A. No.

Q. The bailiff has handed you two documents which have been marked for identification as Plaintiff's Exhibit No. 24. I will ask you what they are.

A. The first is a letter from the Bureau of Federal Supply [78] dated June 23, 1949, and it is addressed to the Sullivan Mining Company, subject contract SCM-TS-12755, and reads as follows: "Ref-



(Testimony of Wallace G. Wolf.)

erence is made to your letter of March 24, 1949, relative to storage and handling charges under the subject contract. It is the intent of the contract that you will be paid for unloading and handling inbound, and handling, loading and weighing outbound, in accordance with the terms and conditions of the contract, for all materials to be shipped to another location on or after December 1, 1948.

"The subject of liability for such charges for material which was shipped out prior to December 1, 1948, is still a matter of dispute between the Reconstruction Finance Corporation and this Bureau. It is anticipated that a settlement will be reached in the near future, and you will be promptly advised as to the Government agency liable for such claims." And that is signed by H. C. Maull, Jr., Chief, Purchase Division. The second document is a letter from the Bureau of Federal Supply dated August 9, 1949, and is addressed to the Sullivan Mining Company and signed by Mr. H. C. Maull, Jr. It states: "By letter dated June 23, 1949, you were advised that the subject of liability for charges for material shipped out prior to December 1, 1948, was a matter of discussion between this Bureau and the [79] Reconstruction Finance Corporation. All questions arising out of such discussions have now been settled and it has been determined that, as expressed in previous letters, this Bureau will not be liable for charges for material shipped to another location prior to December 1, 1948. Claims representing such charges are properly for con-

(Testimony of Wallace G. Wolf.)

sideration by the Reconstruction Finance Corporation and the contract which has been forwarded to you is designed to cover contractual relationships between your company and the Bureau of Federal Supply from the period beginning December 1, 1948.

“It is hoped that in the light of the above information you will see your way clear to executing the contracts previously mailed to you. If such is the case, the procedure outlined in our letter dated February 3, 1949, should be followed in the execution thereof.”

Mr. Brown: At this time we offer Exhibit No. 24 in evidence.

Mr. Donahue: And I make the same objection.

The Court: It may be admitted under the same ruling.

Q. As a result of that correspondence, did your company execute the contracts?

A. No. [80]

Q. In August, 1949, at the time of this correspondence, what concentrates were still in stockpile, —in the Government stockpile or the Reconstruction Finance Corporation stockpile?

A. There was the balance of the concentrates that had been stored for the Government account less some 17,500 odd tons that had been removed and shipped to the Anaconda Copper Mining Company the previous year.

Q. So that at the time of all of this correspondence as evidenced by Exhibit 24 and 25 the concen-

(Testimony of Wallace G. Wolf.)

trates were still in stockpile with the exception of 17,500 tons previously shipped?      A. Yes.

Q. The bailiff has handed you an instrument marked Plaintiff's Exhibit No. 25 for identification. I will ask you, Mr. Wolf, what that is?

A. It is a letter written by me as superintendent, addressed to the Bureau of Federal Supply under date of August 25, 1949: "This is written in answer to your letter of August 9, 1949, concerning contract SCM-TS-12755. Reference is also made to your letter of February 3, 1949, enclosing copies of this contract and other correspondence on this subject.

"In our original agreement with Metals Reserve Company of June 18, 1942, and subsequent renewals of [81] this agreement we undertook to purchase for the account of Metals Reserve Company, zinc concentrates tendered to us in excess of our processing capacity and to stockpile them. The same contract provided for our repurchasing all or part of this material from time to time as we were able to treat same. It was with this commitment that we agreed to provide storage and to stockpile at our expense. We offered through Mr. Charles R. Ince, manager of Metal Sales of the St. Joseph Lead Company, to commence treatment of the remaining stored concentrates, approximately 48,000 tons. Our offer was in conformity with the purchase provision as set forth in the agreement of June 18, 1942, in fact, we made a better offer to you than the one so provided because we agreed to deliver to you 85 per cent of the contained zinc as compared to

(Testimony of Wallace G. Wolf.)

the payment of 80 per cent of the zinc content as our present zinc concentrate purchase schedules and contracts provide. Notwithstanding this we are now advised by Mr. Ince that our offer was rejected by you although as yet we have had no direct advice from you to this effect. We respectfully request that we have your formal advice on this matter.

“On the assumption that our offer to treat the stored zinc concentrates is rejected and that the concentrates will be loaded and shipped elsewhere, [82] we, of necessity, are making a determined effort to locate other concentrates for purchase as a replacement. If we are successful in this we doubt that we can make arrangement for the loading and shipment of your concentrates to your new customer. As previous correspondence referred to above has informed you, the Bunker Hill smelter has in the past serviced our concentrates in and out of stockpiles because we ourselves have neither the available storage space nor suitable equipment. The Bunker Hill smelter now advises us that with our own expanded operations because of the recent zinc plant enlargement they will only be able to service our current operations. They inform us that only a very limited amount of time will be available for additional extra work and such work will no doubt entail overtime rates. In any event, they state the existing equipment and personnel would not permit the loading of more than 3,000 tons per month from your stockpile. We do not know the monthly tonnage you plan to have loaded and shipped from



(Testimony of Wallace G. Wolf.)

your local stockpiles, although Mr. Ince has informed us that much larger tonnages than the above mentioned 3,000 tons per month were contemplated.

"Under the conditions above stated we, therefore, do not feel in a position to execute the contract as far as it pertains to the loading and the shipment of your [83] concentrates."

Mr. Brown: We offer Exhibit No. 25 in evidence at this time.

Mr. Donahue: May I ask a question on voir dire?

The Court: Yes, you may.

Q. (By Mr. Donahue): Mr. Wolf, who is Mr. Charles R. Ince?

A. Mr. Charles R. Ince was the sales manager for the St. Joseph Lead Company. The St. Joseph Lead Company is our selling agent for zinc in the United States east of the 95th Meridian and all export sales of zinc.

Q. In paragraph three of this letter, Plaintiff's Exhibit 25, that you have been referring to, you state in that letter to the Treasury Department as follows: "We offered through Mr. Charles R. Ince, manager of Metal Sales of the St. Joseph Lead Company, to commence treatment of the remaining stored concentrates, approximately 48,000 tons. Our offer was in conformity with the purchase provision as set forth in the agreement of June 18, 1942." Do you have any correspondence in your files between Mr. Ince and the Treasury Department?

A. There may be some correspondence in our



(Testimony of Wallace G. Wolf.)

files, I am uncertain of that. The situation was this, that Mr. Ince in his position as sales manager of the St. Joseph Lead [84] Company, selling both lead and zinc, was on some of the advisory committees in Washington and the result was that he was in and out of Washington quite frequently and for convenience he took up this matter for us in the matter of arranging for the sale to us of those remaining concentrates under the terms of the contract and we gave him certain schedules which he presented for us.

Q. Do you know, approximately, the date that Mr. Ince, as you say, made these representations or offers to the Treasury Department?

A. To my recollection it was shortly prior to the date of that letter.

Q. Do you have any correspondence with Mr. Ince, directing him to make this offer to the Treasury Department?

A. I am uncertain as to that. I may have some in my files but I recall that part of the matter was taken up with Mr. Ince over the telephone because it was a matter of expediting things.

Q. Do you have any correspondence from the Treasury Department indicating that they declined the offer from Mr. Ince?

A. No, I requested that in a letter to the Treasury Department but I never received any reply in answer to that letter.

Q. Did you, at any time, yourself, or through

(Testimony of Wallace G. Wolf.)

Mr. Ince [85] renew your demand which you claimed,—not demand but offer?

A. As I recall, Mr. Ince subsequent to that time did try to get our offer reinstated but he was not successful.

Q. Do you know whether Mr. Ince ever corresponded directly with the Treasury Department or with the Bureau of Federal Supply?

A. Yes, I think he did correspond directly.

Q. But you don't definitely know of your own knowledge?

A. Yes, I think I have some copies of his letters, copies of that correspondence.

Q. If you have copies of letters relative to this transaction between Mr. Ince and the Treasury Department, Bureau of Federal Supply, will you try to find them for us so that we can look at them?

A. Yes.

Q. You say that this offer was made shortly before this letter was written?

A. To my recollection, yes.

Mr. Donahue: That is all on the voir dire. I do want to interpose an objection to paragraph three of Plaintiff's Exhibit No. 25 upon the ground that it is incompetent, irrelevant and immaterial, also upon the further ground that it is hearsay. It is apparently an offer made to the Treasury Department, [86] Bureau of Federal Supply, by the St. Joseph Lead Company which is not a party to this litigation.

(Testimony of Wallace G. Wolf.)

The Court: I am inclined, at this time, to think that your objection is well taken. A moment ago I used the date of October 2, 1948. I think I should have used the date of June 30, 1948. I think that is the last stockpiling for the Government, however I can check on that. All of these letters and negotiations after that date, whichever date is correct, was just trying to get the matter straightened out. However, I am going to admit this letter the same as I did the others, it will be admitted subject to the objection. I think I have somewhat of an understanding of the situation that we are faced with here. I am a little undecided as to what the relevancy of the later letters are, except that they seem to be material in answering your contention in your answer in this cause.

Mr. Brown: I know that your Honor has not had an opportunity to examine these exhibits, unless you stayed all of last night to make that examination. It perhaps is not clear as to the purpose of these exhibits because of the fact that you have not had that opportunity and I would like to make it clear as to why we think they are relevant in this matter. The original contract of June 18, 1942, provided that Sullivan Mining [87] Company should stockpile concentrates for the Metals Reserve Company at Sullivan's expense. That contract, at that time, provided and contemplated that Sullivan was going to process all of those concentrates. The amendment of July 12, 1944, gave the right for modification, gave the Reconstruction Finance Cor-

(Testimony of Wallace G. Wolf.)

poration or the Metals Reserve Company the right, for the first time to remove——

The Court: ——I think that I have this absolutely clear at this time.

Mr. Brown: Our point is that the stockpiling costs were out-of-pocket, but the liability did not accrue until the concentrates were removed because no one knew at that time or until then how many were going to be removed.

The Court: As I said, it was up until June 30, 1948, that the Sullivan Company stockpiled this material and while they were stockpiling it they contemplated that they were going to treat it. There is one question here that I was going to ask of this witness before he left the stand and that was, what advantage it was to the Sullivan Mining Company to stockpile this material unless they were going to treat it.

Mr. Brown: You may answer that, Mr. Wolf.

A. The answer to that is none.

The Court: That is the way I took it, so that the only object you had in stockpiling this material was to have the privilege of treating it.

A. Yes, sir.

The Court: I think I have the matter pretty well in mind now as far as the evidence has gone.

Mr. Brown: I wonder if we might have a few minutes recess, if the Court please, because I think with that we may be able to eliminate some of these matters and shorten up the trial.

The Court: Just as you wish, there are several

(Testimony of Wallace G. Wolf.)

questions here to determine. I don't like to make a statement such as I have made a few minutes ago because I am afraid that when I get this all cleared up in my mind that I may be wrong and may have to change any ideas that I have at this time. We will take a ten minute recess. I want you gentlemen on both sides to go right ahead and please don't take any remark that I have made as any indication as to how I might feel on this matter when it is submitted.

Mr. Brown: I think we understand that, your Honor.

Mr. Donahue: Yes, indeed, that is perfectly clear to us, we have no doubt of that, your Honor.

November 3, 1953, 11:10 a.m.

Q. Mr. Wolf, some questions were asked you with respect to Mr. Charles R. Ince and the St. Joseph Lead Company, is that company a subsidiary of yours?     A. No.

Q. Is there any ownership at all in your company of that company?

A. None, whatever. The St. Joseph Lead Company sells our zinc. Our zinc is a special high grade premium zinc and the St. Joseph Lead Company as a company produces other grades of zinc but they do not produce special high grade zinc and they act as our sales agent for this special high grade zinc. It is a special advantage to us and to them because it rounds out their sales of all grades of zinc to the trade.



(Testimony of Wallace G. Wolf.)

Q. Mr. Wolf, earlier in your testimony and in one of the exhibits, it became apparent that RFC had in 1946 requested you to process a portion of the stockpiles and at that time you had not had adequate facilities and you gave certain reasons in your testimony, I believe, with respect to manpower and, in fact, you, at one time, had to shut down one of the units, I believe. At the time that you offered to purchase the remaining part of the stockpile in 1949, as evidenced in Exhibit No. 25, had there been some change [90] in your condition or your facilities?

A. Yes, as I testified earlier, our zinc plant in those earlier years consisted of three electrolytic units. In the years subsequent to that we added an additional fourth electrolytic unit with necessary auxiliary enlargement of the remaining parts of the plant so that late in 1949 we had four units and the plant was correspondingly enlarged. The cost of that unit, the fourth unit, was somewhere in the range of two and a half million dollars.

Q. Did that put you in a position to handle these concentrates at the time this offer was made?

A. Yes.

Q. I will ask you, shortly after your communication of August 25, 1949, plaintiff's Exhibit No. 25, whether the concentrates in the stockpile were removed?

Mr. Donahue: What was that date, Mr. Brown?

Mr. Brown: After his letter of August 25, 1949. That is Plaintiff's Exhibit No. 25, Mr. Donahue,

(Testimony of Wallace G. Wolf.)

that question was whether the concentrates in the stockpile were removed?

A. Yes, they were.

Q. Mr. Wolf, the bailiff has handed you instrument marked Plaintiff's Exhibit No. 26 for identification, I will [91] ask you to state what that is?

A. That is a letter under date of September 20, 1949, from the General Services Administration, Bureau of Federal Supply. It is air mail special delivery and addressed to the Sullivan Mining Company and states: "Enclosed herewith are 15 government bills of lading", then it gives their numbers, and then it continues: "To be used for the movement of zinc concentrates from storage at Silver King, Idaho, to Anaconda Copper Mining Company, Wallace, Idaho. These bills of lading are sent to you in advance so that there will be no delay in the movement of the zinc concentrates. Complete instructions for their use will follow either by telegram or letter within a few days." That letter is signed by A. G. Wildberger, Chief, Storage and Transportation Division.

Mr. Donahue: What is the date of that letter, Mr. Wolf, I didn't get that?

A. September 20, 1949.

Mr. Brown: I offer Exhibit No. 26 in evidence at this time.

Mr. Donahue: To which exhibit the defendant objects upon the ground that it is incompetent, irrelevant and immaterial, having to do with a situation existing between the Bureau of Federal Supply,

(Testimony of Wallace G. Wolf.)

Treasury Department, and the Sullivan Mining Company, a considerable [92] time subsequent to the assignment.

The Court: It will be admitted subject to your objection.

Q. Did you subsequently receive shipping instructions?           A. We did.

Q. The bailiff has handed you a series of instruments which are marked Plaintiff's Exhibit No. 27 for identification, I will ask you, Mr. Wolf, what they are?

A. This is a series of letters and telegrams interchanged between the General Services Administration and the Sullivan Mining Company, referring to the shipping out of these concentrates to the Anaconda Copper Mining Company. Various directions and bills of lading and details that we handled in the servicing of the loading out of these concentrates for the Bureau. The actual loading out was done by an independent contractor but we handled for him the bills of lading and the necessary Government paperwork involved in it.

Mr. Brown: We offer Exhibit No. 27 in evidence at this time.

Mr. Donahue: The defendant objects to the admission of Plaintiff's Exhibit No. 27 upon the ground that it is incompetent, irrelevant and immaterial as far as this case is concerned and the parties involved here.

The Court: It apparently shows, throughout [93] the exhibit, what became of the concentrates. It

(Testimony of Wallace G. Wolf.)

seems to me that it is material in showing that the concentrates were not treated by the plaintiff but were shipped elsewhere for treatment, objection is overruled and they will be admitted.

Q. Mr. Wolf, I understood in the course of your identification of the exhibit that your company did not actually load out those concentrates?

A. No, the actual loading out was done by a local contractor who had the necessary equipment, it was Mr. E. G. Smith of Wallace. He loaded the concentrates and transported them by truck to Wallace, Idaho, and loaded them into the railroad cars. They were shipped over the Northern Pacific from Wallace to the Anaconda Copper Mining Company. We handled all of the paper work and so on that was necessary for the loading out and prepared the Government documents that had to do with the loading out of the concentrates.

Q. Were the costs of this series of telegrams of yours included in your statement?

A. They were not.

Q. Was any part of the charge at any time, for any supervision, from 1942 up to and through 1950, when the last concentrates were shipped, any part of the claim here against Reconstruction Finance Corporation? [94]

A. No, those charges are not a part of the claim, no, sir.

Q. Mr. Wolf, the bailiff has handed you an instrument,—there are two instruments, it is marked

(Testimony of Wallace G. Wolf.)

as Plaintiff's Exhibit No. 28 for identification, I will ask you what that exhibit is?

A. The first is a letter under date of March 4, 1950, written by me as superintendent, addressed to Mr. J. E. Salisbury, Chief, Storage and Transportation Division, General Service Administration, Bureau of Federal Supply; it states: "Reference is made to your request at the conference in your office on February 17, 1950, that I write you giving a break-down of costs representating the 85 cents per ton in-bound cost of placing concentrates in stockpile storage, which concentrates have been and are now being removed pursuant to your shipping instruction of September 21, 1949." Then followed a telegram or rather a copy of a telegram dated January 13, 1949, addressed to the Sullivan Mining Company for my attention: "Reference storage agreement now in preparation covering approximately 48,000 tons zinc concentrates stockpiled at Silver King, Idaho, to which we have assigned contract No. SCM-TS-12755, please advise whether a flat rate cost per ton in and a flat rate per ton out inclusive of weighing on inbound and out-bound in accordance with standard commercial practice would be satisfactory to your company and advise by wire [95] the rate for such services." That is signed by J. E. Salisbury. Then there is another, a reply telegram under date of January 14, 1949,—

Q. That is a long letter, Mr. Wolf, for the purpose of identifying it will you state whether or not there is a break-down of the entire cost of the stock-



(Testimony of Wallace G. Wolf.)

seems to me that it is material in showing that the concentrates were not treated by the plaintiff but were shipped elsewhere for treatment, objection is overruled and they will be admitted.

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A. No, those charges are not a part of the claim, no, sir.

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(Testimony of Wallace G. Wolf.)

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Q. That is a long letter, Mr. Wolf, for the purpose of identifying it will you state whether or not there is a break-down of the entire cost of the stock-

(Testimony of Wallace G. Wolf.)

piling of these concentrates,—the entire tonnage, received, whether it was furnished at the request of Mr. Salisbury?

A. Yes, sir, there is.

Q. Is there attached to that letter, and as a part of the exhibit, a complete break-down of the cost?

A. Yes, sir, it is headed “cost of placing zinc concentrates into stockpile storage June, 1942, through November, 1946.”

Q. Is there an allocation of the cost between those that were stockpiled under the Metals Reserve Company agreement and the cost of your own stockpile?

A. There was, as I explained previously, in my earlier testimony, I am quite certain,—the cost for the Bunker Hill smelter charges were made to us on a total basis. We were stockpiling concentrates for the Sullivan Mining Company account and we were also stockpiling concentrates for the Metal Reserve account and charges were made to us and paid by us, disregarding what stockpile the concentrates were going into. On this final statement we show the tons that were stockpiled for the Sullivan Mining Company and the tons stockpiled for the Federal [96] Reserve and the proportionate cost.

Q. You mean that were stockpiled under the original stockpiling contract?

A. The entire stockpile.

Q. What is the total tonnage allocated to them?

A. 72,263 and 64/100 tons,—if I said Federal

(Testimony of Wallace G. Wolf.)

Reserve in my previous answer it should have been Metals Reserve Company, that was the account.

Q. And what was the cost figure?

A. \$54,864.10.

Mr. Brown: I offer Exhibit No. 28 in evidence at this time, and, if your Honor please, if there is any question about this I will connect it up with the next exhibit which we think is most material to our theory and our position in this case. If the Court wishes to reserve ruling on this matter until I offer the next exhibit, that would be agreeable because we think it is most material and important.

Mr. Donahue: At this time, if the Court please, I will make the same objection with reference to the Reconstruction Finance Corporation, the defendant in this case. This Exhibit No. 28 becomes entirely irrelevant and immaterial.

The Court: I understand that counsel is going to connect it up to some extent. It will be admitted.

Q. Mr. Wolf, the bailiff has handed you two instruments which are marked for identification as Plaintiff's Exhibit No. 29, I will ask you what they are?

A. The first is a letter under date of March 1, 1950, to the Sullivan Mining Company and it is signed by J. E. Salisbury, Chief, Storage and Transportation Division, the subject is Contract AA-29, unloading of zinc concentrates, and is as follows: "Reference is made to discussion of February 17, 1950, in the office of the undersigned, wherein it was agreed that the General Services Administra-

(Testimony of Wallace G. Wolf.)

piling of these concentrates,—the entire tonnage, received, whether it was furnished at the request of Mr. Salisbury?

A. Yes, sir, there is.

Q. Is there attached to that letter, and as a part of the exhibit, a complete break-down of the cost?

A. Yes, sir, it is headed “cost of placing zinc concentrates into stockpile storage June, 1942, through November, 1946.”

Q. Is there an allocation of the cost between those that were stockpiled under the Metals Reserve Company agreement and the cost of your own stockpile?

A. There was, as I explained previously, in my earlier testimony, I am quite certain,—the cost for the Bunker Hill smelter charges were made to us on a total basis. We were stockpiling concentrates for the Sullivan Mining Company account and we were also stockpiling concentrates for the Metal Reserve account and charges were made to us and paid by us, disregarding what stockpile the concentrates were going into. On this final statement we show the tons that were stockpiled for the Sullivan Mining Company and the tons stockpiled for the Federal [96] Reserve and the proportionate cost.

Q. You mean that were stockpiled under the original stockpiling contract?

A. The entire stockpile.

Q. What is the total tonnage allocated to them?

A. 72,263 and 64/100 tons,—if I said Federal



(Testimony of Wallace G. Wolf.)

Reserve in my previous answer it should have been Metals Reserve Company, that was the account.

Q. And what was the cost figure?

A. \$54,864.10.

Mr. Brown: I offer Exhibit No. 28 in evidence at this time, and, if your Honor please, if there is any question about this I will connect it up with the next exhibit which we think is most material to our theory and our position in this case. If the Court wishes to reserve ruling on this matter until I offer the next exhibit, that would be agreeable because we think it is most material and important.

Mr. Donahue: At this time, if the Court please, I will make the same objection with reference to the Reconstruction Finance Corporation, the defendant in this case. This Exhibit No. 28 becomes entirely irrelevant and immaterial.

The Court: I understand that counsel is going to connect it up to some extent. It will be admitted.

Q. Mr. Wolf, the bailiff has handed you two instruments which are marked for identification as Plaintiff's Exhibit No. 29, I will ask you what they are?

A. The first is a letter under date of March 1, 1950, to the Sullivan Mining Company and it is signed by J. E. Salisbury, Chief, Storage and Transportation Division, the subject is Contract AA-29, unloading of zinc concentrates, and is as follows: "Reference is made to discussion of February 17, 1950, in the office of the undersigned, wherein it was agreed that the General Services Administra-

(Testimony of Wallace G. Wolf.)

tion, Federal Supply Service, as assignee under the captioned contract, would reimburse you for unloading expenses incurred in connection with the tonnage removed from your premises under our instructions, provided such expenses were payable under the terms of AA-29. After a thorough examination and review, it is our considered opinion that there is no liability on our part under the contract in regard to unloading expenses. We base this opinion on the following:

(1) The original contract provided that your company should bear the expense of stockpiling.

(2) The amendment of July 12, 1944, limited reimbursement in the event the concentrates were shipped elsewhere to the cost of removal. [98]

"We trust that you are in accord with the above." The second instrument is a letter from the Treasury Department, Bureau of Federal Supply, dated March 10, 1950, addressed to me as superintendent, Sullivan Mining Company, and is signed by J. E. Salisbury, Chief, Storage and Transportation Division, and is as follows: "Subject: Contract AA-29, unloading of zinc concentrates. Thank you for your letter of March 4, 1950, in regard to the above subject. The contents have been duly noted, however, same does not alter the opinion expressed in our letter of March 1, 1950, which apparently crossed yours in the mail."

Mr. Brown: We offer Exhibit No. 29 at this time as proof that the purported assignment from the Reconstruction Finance Corporation, Bureau of

(Testimony of Wallace G. Wolf.)

Federal Supply never became effective; that there was nothing more than a physical custody of the stockpile which right they had under the amendment of July 12, 1944. That the reason the assignment was not effective was that this exhibit shows that the Sullivan Mining Company, by Exhibit No. 28 had set forth the entire cost, at their request, of this stockpiling and had been refused every part of the obligation. They actually and expressly refused to assume the obligation of the Reconstruction Finance Corporation, by these exhibits which made the [99] assignment,—a unilateral assignment, by the way,—ineffective. On that theory, if the Court please, we introduce this exhibit.

Mr. Donahue: If the Court please, in reference to Plaintiff's Exhibit No. 29, the defendant, Reconstruction Finance Corporation, objects to the same upon the ground that it is incompetent, irrelevant and immaterial, having to do with a situation that was strictly between the Treasury Department, Bureau of Federal Supply, and not with the Reconstruction Finance Corporation, as such.

The Court: I will admit it under the same ruling that I made in connection with other exhibits. After studying the matter it will be stricken if I feel that your objection is well taken.

Mr. Donahue: Thank you.

Q. Mr. Wolf, I notice in examining Plaintiff's No. 28, containing the breakdown of the costs through the period of stockpiling, that during the years 1942 and 1943 aside from the crane unloading

(Testimony of Wallace G. Wolf.)

expense, there was very little expense with respect to the cost of lumber and labor, can you explain the reason for that?

A. When the stockpiling of the Government concentrates began, the first stockpiling was placed in bins that the Sullivan Mining Company had been using on the Bunker [100] Hill smelter ground. Later on the smelter itself made available to us other bins by moving some of their material out and giving us those bins for use in stockpiling these concentrates, so at the start there was comparatively little expense for building bins. Later on, after we used up all of the bins available we had to start constructing further additional bins and then the cost increased.

Q. Would it have been necessary for you, in the conduct of the operation of your electrolytic zinc plant, to have built this series of bins had you not entered into the contract with the Metals Reserve Company for stockpiling concentrates?

A. Definitely no.

Mr. Brown: You may take the witness.

#### Cross Examination

Q. (By Mr. Donahue): Mr. Wolf, did you state what your position with the Sullivan Mining Company was?

A. Yes, sir, I am the superintendent of the electrolytic zinc plant of the Sullivan Mining Company.

Q. What connection is there, if any, between the

(Testimony of Wallace G. Wolf.)

Bunker Hill Smelter and the Bunker Hill and Sullivan Mining Company?

A. The Bunker Hill Smelter is a smelting operation that [101] is owned and operated by the Bunker Hill and Sullivan Mining and Concentrating Company.

Q. Then as I understand it, the Sullivan Mining Company, the Bunker Hill and Sullivan Mining Company and the Bunker Hill Smelter are separate corporations but work practically as a unit, is that correct?

A. The Bunker Hill and Sullivan Mining and Concentrating Company and the Sullivan Mining Company are separate corporations. The Bunker Hill Smelter is a part of the Bunker Hill and Sullivan Mining and Concentrating Company. All three operations, the operation of the Bunker Hill mines and the concentrating mills, the Bunker Hill Smelter and the Bunker Hill and Sullivan Mining and Concentrating Company are under the management of Mr. Haffner and he is also the manager of the Electrolytic Zinc Plant of the Sullivan Mining Company, so that in reality there is a very close cooperation among the three.

Q. Is there a stock ownership between the companies?

A. As I explained in previous testimony, the Sullivan Mining Company is a separate corporation and is owned by the Bunker Hill and Sullivan Mining and Concentrating Company and the Hecla



(Testimony of Wallace G. Wolf.)

Mining Company on a 50-50 basis, each company owns 50 per cent of the stock.

Q. Now, the Bunker Hill and Sullivan Mining and Smelting [102] Company take care of what sort of an area, what sort of mineral area?

A. The Bunker Hill and Sullivan Mining and Concentrating Company, to my understanding, takes care of its own Bunker Hill mine and it is also, so far as the smelter is concerned, it is a custom smelter and treats lead concentrates from various sources of supply, not only including the Coeur d'Alene mining district mines but other mines as well.

Q. It is a fact that the Bunker Hill and Sullivan Company, which owns one half of the Sullivan Mining Company, does treat a great proportion of the ores produced in the Coeur d'Alene district, is that correct,—a great proportion of the concentrates produced in that area or district.

A. They treat and handle a considerable proportion, however, there is a large production from properties owned by the American Smelting and Refining Company that are not handled or treated by the Bunker Hill and Sullivan Mining and Concentrating Company.

Q. Where does the American Smelting and Refining Company treat their concentrates?

A. It is my understanding that they are treated at their West Helena, Montana, smelter.

Q. It is a fact, is it not, that it is the policy of the [103] Sullivan Mining Company to endeavor

(Testimony of Wallace G. Wolf.)

to cooperate with the small mining properties in the Coeur d'Alene district as much as possible?

A. That is true.

Q. And it is a fact also, is it not, that the Sullivan Mining Company and the Bunker Hill and Sullivan Mining Company are anxious to obtain ores and concentrates,—zinc and lead ores and concentrates from all of those small operations in the Coeur d'Alene district?

A. Yes, in general, that is a true statement. We do want to treat their products.

Q. As a matter of fact, the future of the Coeur d'Alene district probably now rests on the small individual operator?

A. I would not say that.

Q. It is the history of mining, is it not, that it is the small prospector or the small operator that very often goes out and originally discovers these big mines?

A. That is true.

Q. These are usually, later, affiliated with the larger companies and it becomes a matter of good business for every one, is that true,—I mean, they may become affiliated with companies like the Sullivan Mining or the Bunker Hill and Sullivan Mining and Smelting Company?

A. That is true, except to my knowledge, in the district [104] there is considerable amount of important development work for the discovery it is hoped, of new deposits and the major portion of that work is being done by the Bunker Hill and Sullivan Mining and Concentrating Company and

(Testimony of Wallace G. Wolf.)

the Hecla Company, who are the joint owners of the Sullivan Mining Company and also the American Smelting and Refining Company.

Q. But what I am chiefly getting at is that your company or companies, the Sullivan Mining Company and the Bunker Hill and Sullivan Company very definitely do have the interest of the small operator at heart? A. That is true.

Q. Now, when this stockpiling agreement was entered into you say that there were about 47 shippers that shipped to that stockpile, is that correct?

A. Later on, as the program developed, yes. At the start, the commencement of the stockpiling, to my recollection, we had something like 15 shippers and that was later increased, during the premium price plan to a total of 47 shippers.

Q. Now, would you be able to tell me what mines besides the Sullivan Mining Company were either operated by the Sullivan Mining Company or mines in which the Sullivan Mining Company were financially interested that shipped to the stockpiles?

A. Would you repeat that question?

Q. Yes, tell me if you can, what mines besides your mine or mines operated by you or in which the Sullivan Mining Company had a financial interest were shipping to this stockpile?

A. To my recollection, the only mine that the Sullivan Mining Company was interested in financially was its Star mine, that is owned and operated by the Sullivan Mining Company.

Q. There were concentrates shipped to that

(Testimony of Wallace G. Wolf.)

stockpile that came out of the Bunker Hill and Sullivan mine, were there not?

A. Yes, we treat and process the zinc concentrates from the Bunker Hill and Sullivan mine.

Q. And there were concentrates that went into the stockpile that came from the Hecla?

A. The Hecla Mining Company, as a result of the premium price plan, processed tailings that had been lying for many years in the Coeur d'Alene River Valley,—these concentrates, that is, the concentrates resulting from the tailing treatment were also sold to the Sullivan Mining Company and shipped to the stockpile.

Q. You explained this plan yesterday, as I recall it, that is, the premium price plan and as I understand it, that was the payment by the Government for over-quota production, is [106] that correct?

A. That is true.

Q. Is it true, Mr. Wolf, that the Sullivan Mining Company and the Star Mining Company and any other mining company that the Sullivan Mining Company was interested in all got the benefit of this over-quota payment plan, the premium payment plan?

A. The Star Mine of the Sullivan Mining Company may or may not have had a quota, I cannot answer definitely as to that.

Q. Well, will your records show whether or not it did have a quota?

A. Yes, I suppose our records of receipts of

(Testimony of Wallace G. Wolf.)

zinc concentrates would indicate if the Star Mine had a quota.

Q. Calling your attention to Exhibit No. 28,—just go to the last page of that exhibit,—the breakdown is what I am referring to, the last page indicates that there was a total of 86,000 tons of concentrate in that stockpile, is that correct?

A. That is correct.

Q. Out of that total, 72,263 tons were for the account of the Metals Reserve Company?

A. Yes, sir.

Q. Now, would you be able to tell me, Mr. Wolf, out of that 72,000 tons that were stockpiled for the account of [107] Metals Reserve Company, how much of those concentrates were furnished by your Star Mining Company?

A. I can't off-hand, I would have to refer to our records.

Q. Handing you what has been marked Defendant's Exhibit No. 30, which is a letter to Mr. Borel, Supervising Engineer, Reconstruction Finance Corporation, by or from Mr. T. J. Doherty, setting out the amount of concentrates that were stockpiled under contract AA-29 and giving the names of certain operators, I will ask you to state whether or not that is approximately correct in your opinion or from your records?

The Court: Will you show that exhibit to Mr. Brown. Now, Mr. Brown, do you have any objection? Are you offering this at this time, Mr. Donahue?



(Testimony of Wallace G. Wolf.)

Mr. Donahue: I am going to offer it in evidence, if the Court please.

Mr. Brown: I have no objection to Mr. Wolf testifying as to those figures. Of course, that appears to be simply an inter-office communication and we would have no knowledge of that, I don't think that we have any objection, however.

The Court: I was just thinking that if there was any objection it should be in the record before this man is allowed to testify about this [108] instrument but inasmuch as you have no objection it may be admitted now. You may proceed, Mr. Donahue.

Q. Now, Mr. Wolf, from Defendant's Exhibit No. 30, will you read the tonnage that was stock-piled from those various mine operations?

A. "Under the subject contract we have stock-piled at the smelter at Silver King, Idaho, the following zinc concentrates: Description, tonnage, approximate weighted average zinc content. Bunker Hill 7,074 SDT". That means standard dry tons, "53.1 per cent. Hecla 911 SDT 51.8 per cent. Spokane 5,571 SDT 40.3 per cent. Star 51,945 SDT 49.5 per cent."

Mr. Brown: What is that per cent that you have read?

Q. That is the weighted average of the zinc content, the zinc content of the concentrate.

A. That is right, the average analysis of the zinc content.

Mr. Brown: And that represents dry tons?

(Testimony of Wallace G. Wolf.)

A. Yes, sir.

Q. And if that was calculated in wet tons, the tonnage there would be greater, would it not?

A. I imagine that the moisture would be about 10 per cent so you would have to increase by that percentage. [109]

Q. It indicates in that, does it not, that out of the 72,263 tons of wet ton concentrates set out in your Exhibit No. 28, that 51,000 plus of concentrates were furnished to the stockpile by the Star Mine?

A. That is correct, with this exception, as has been mentioned here, we had an increased number of shippers; many of those shippers produced small tonnage of concentrates. We were up against the question of bin capacity all the way along because of the shortage of bins and the shortage of labor and so on and also the shortage of lumber to build the bins. So it was our policy to process as many of the small tonnages as we could and to put the tonnage from the major producers into the stockpile. In that way, since we had instructions from the Government to keep the zinc concentrates from each shipper separate and apart, in order to avoid building bins for a lot of small tonnages, we processed the concentrates from as many small producers as we could and we stockpiled shipments from the major producers.

Q. But it still remains a fact that the Star Mine and the Bunker Hill and Sullivan Mine furnished

(Testimony of Wallace G. Wolf.)

well over 55 or 56 thousand tons of the total of 72,000 tons that went into the stockpile? [110]

A. Yes, those percentages of tonnage are approximately correct, I assume, however, I do recall that we limited the stockpile to four producers. That was for the reasons that I have stated.

Q. And one of those very big producers was the Star Mine? A. Yes.

Q. And one of the other big producers was the Bunker Hill and Sullivan Mine? A. Yes.

Q. One of the others was the Hecla?

A. Yes,—however, you notice the amount stored for the Hecla was only 911 tons, that again is because in the case of the concentrates, they were of comparatively low grade and you will recall from previous testimony that we were limited in the amount of low grade material that we could put in the stockpile, that was another reason why we stockpiled the concentrates from the Star and the Bunker Hill and Sullivan, they were of standard grade that the Government would accept for the stockpile.

Q. After contract AA-29 was entered into in 1942, up until the time the stockpile agreement ended in June of 1947 the Star Mine sold practically all of their concentrates or all of them to the Metals Reserve Company and they were stockpiled, and about all that the Sullivan Mining Company smelted on their own account were from the small [111] producers, is that not correct?

A. In addition to the amount of the Star con-

(Testimony of Wallace G. Wolf.)

centrates that we stockpiled, we were also processing a considerable portion of the Star concentrates, because as I explained in previous testimony, we were taking at that time purchasing and treating some of this low grade material and it was necessary to commingle it with the better grade because there was only a limited amount that we could stockpile. I would like to say further that the Star Mine ships us concentrates as do other producers and during this period the material that we placed in storage was simply a matter of the zinc plant's own determination, we did it having in mind metallurgy and the operation of the plant and the bin situation that I have heretofore described.

Q. If that is correct then out of a total of 72,000 tons put into the stockpile for the Metals Reserve Company, 51,000 dry tons of that was produced by the Star Mine and you say there were other Star concentrates on top of that that you processed yourself?

A. That is my recollection.

Q. That being true, there was a very huge tonnage from the Star Mine going either into the stockpile or into the Bunker Hill smelter? [112]

A. The Star Mine is a large producer. I would have to refresh my memory as to their monthly production, but as I recall during that period they also suffered from labor shortage and their production was cut down accordingly, however, they are one of the largest shippers to the Sullivan zinc plant.

(Testimony of Wallace G. Wolf.)

Q. Now, Mr. Wolf, we have a whole series of letters introduced by your attorney and dealing with the extensions and increase of the stockpiling limits, starting back in July, 1942, I believe it is dated July 7, 1942. Calling your attention to a long series of letters exchanged between the Sullivan Mining Company and the Metals Reserve Company,—I call your attention first to Exhibit No. 4, it is a letter dated July 7, 1942, addressed to Mr. Bridgeman from the Sullivan Mining Company?

A. Yes, I have that here, what did you say was the date?

Q. I have on my notes July 7.

A. Yes, I have that.

Q. Down at the bottom of the first page it says: "From the foregoing it appears that while the co-operation of Metals Reserve Company in purchasing 1,500 tons a month is a substantial relief, nevertheless, it is not sufficient to care for the current situation and I respectfully request that the 1,500 tons per month purchased be [113] increased to 2,000 tons per month with a corresponding increase in the total of 10,000 tons now provided for in the agreement."

The Court: Now, Mr. Witness, if you will keep that question in mind we are going to recess at this time until 1:30 and we will adjourn this case until 2:00 o'clock, I have other matters to take up first.

November 3, 1953, 2:00 o'clock, p.m.

Q. Do you have Exhibit No. 4 in your hand, Mr. Wolf?

A. It is here, yes.



(Testimony of Wallace G. Wolf.)

Q. Now then, referring to Exhibit No. 4, a letter dated July 7, 1942. At the bottom of the first page it says: "From the foregoing it appears that while the cooperation of the Metals Reserve Company in purchasing 1,500 tons a month is a substantial relief, nevertheless, it is not sufficient to care for the current situation and I respectfully request that the 1,500 tons per month purchased be increased to 2,000 tons per month with a corresponding increase in the total of 10,000 tons now provided in the agreement." By the way, that letter was signed by Mr. Easton. What did your company, the Sullivan Mining Company refer to when they used the term [114] "substantial relief"?

A. Reference was made to the tonnage that was being stockpiled. In explanation of this I would like to explain how these letters were written. I, as superintendent of the plant, advised my superiors of the tonnage of zinc concentrates that were being received, the tonnage going into the stockpile,—as we approached the limitation I advised them of that fact,—the current tonnage that was being received, it was I that advised them and gave them the estimate of the tonnage that should be increased, and the total that should be asked for and the rate at which it should be done in some instances. You will notice by these exhibits that in some cases the letters are written by Mr. Easton and in some cases by Mr. Hanley and in other cases by Mr. Haffner. This particular letter is written or was written by Mr. Easton and the clause or sentence that you have

(Testimony of Wallace G. Wolf.)

read refers to the fact that our receipts of concentrates in excess of our ability to process were such that we had to have the tonnage of the Metals Reserve concentrates increased,—not only the tonnage but the rate at which they could be stockpiled per month had to be increased, otherwise we would have to refuse some shipments from some producers. We were processing all that we could [115] at the time and we were stockpiling the balance.

Q. It is a fact, from this series of exhibits, this correspondence that every six months approximately, you requested the Metals Reserve Company to increase this stockpile, and that went on continuously throughout that period? A. That is right.

Q. And it finally got up to the point where the Metals Reserve Company had permitted you to stockpile approximately 80,000 tons?

A. I think that was the final figure.

Q. Was it an advantage to the Sullivan Mining Company to have those stockpiles increased?

A. The advantage to the Sullivan Mining Company was nothing unless we were able to process the concentrates. The advantage was to the various shippers who were producing the concentrates. It gave them an outlet for their production, otherwise they would have been shut down.

Q. You were anxious to maintain an outlet for those shippers in that area?

A. In the furtherance of the war effort and because we were informed that every pound of metal

(Testimony of Wallace G. Wolf.)

that could be produced should be produced,—yes, we were anxious to maintain them.

Q. Were you also anxious because of the fact that if you could handle all of those small shippers you could then get [116] full production from the Star Mine and the Bunker Hill Mine and thereby take advantage of these over-quota prices that were being paid?

A. Of course, if those respective companies could produce, presumably they could take advantage of the over-quota price, that was okay, but the main idea that we had in mind in increasing this tonnage was simply to take care of all of the producers. You asked me just before the intermission,—there was an exhibit in which you show the tonnage of the Star Mine, the Bunker Hill and also the Hecla, that had been put into or gone into storage. You asked if it wasn't true that practically all of the production had gone to storage and I was unable at that time to give you those figures. During the intermission I communicated with the office of the zinc plant and got those figures. The concentrates purchased from June, 1942, to November, 1946, inclusive, which was the period of the stockpiling showed that we processed and did not put into the Metals Reserve Company stockpile account 82,898.9225 tons of Star Mine concentrate and 40,132.5970 tons of Bunker Hill concentrate.

Q. I also asked you before the recess if you could tell me whether or not the Star Mine was

(Testimony of Wallace G. Wolf.)

being paid additional payments for over-quota production?

A. And as I recall, I answered that I could not tell you [117] with any assurance. I thought they had a quota but I wasn't able to tell you what it was and I am unable to tell you that now.

Q. Do you know what the quota for the Bunker Hill and Sullivan was?      A. No, sir.

Q. Do you know whether it was substantial?

A. No, I don't know just what it was.

Q. I am handing you Defendant's Exhibit No. 31, which is a letter directed to the vice president of the Metals Reserve Company by Sullivan which indicates that the Star Mine, during the last six months of 1943 had an over-quota premium production of 3,478,654 pounds of zinc. This letter is signed by Mr. Easton. I would like to know if you feel that the computation is correct?

A. This letter is signed by Stanly A. Easton, President of the Sullivan Mining Company, and undoubtedly the figures there are correct, if he signed the letter.

Q. Again referring to that exhibit, it totally covers a period of only six months with reference to the Star Mine, would you say that represents an average of over-quota payments during the following several years until the stockpiling agreement was ended?

Mr. Brown: I object to that, if the Court please, only as being improper cross examination, [118] it has not been shown that Mr. Wolf knew, and I

(Testimony of Wallace G. Wolf.)

believe he stated that he had no knowledge of the Bunker Hill and Sullivan.

The Court: I will admit it and permit him to answer subject, of course, to your objection and I will give it the weight and I think it is entitled to.

A. Well, frankly, I am unable to answer your question one way or another because this period in question,—the last six months of 1943, as I stated the production from the Star Mine as well as from other mines was up and down during this time, depending on the labor situation and so I cannot say whether this represents the over-quota figure or not.

Q. But you wouldn't say that it wasn't represented?

A. No, I am unable to answer it either way.

Mr. Donahue: I will offer Exhibit No. 31 in evidence at this time, if the Court please.

The Court: I will admit it subject to the objection that was made a little bit ago.

Q. Do you know when production of concentrates started from the Star Mine?

A. You mean the start of operation of the Star Mine?

Q. Well, I will ask you that question first, yes, if you know?

A. I am unable to give any definite date of production, but [119] the production from the Star Mine started back many years ago.

Q. That is all I wanted to know relative to that



(Testimony of Wallace G. Wolf.)

matter, was the production of the Star Mine substantially increased about 1942,—the output?

A. I am unable to answer that with any definite knowledge. I don't recall any reason why the Star Mine production was or would be increased substantially in 1942.

Q. However, the increase was made, if the premium was paid on over-quota production?

A. Yes, the over-quota production was based on the immediate period immediately preceding, the over-quota production was an increased production.

Q. And if the Star Mine was paid on an over-quota production then there must have been an increase in the output?

A. Yes, that is true.

Q. Mr. Wolf, you are now handed Defendant's Exhibit No. 32 and I will ask you to examine that and when you are through with it I would like to have it?      A. Yes.

Q. Defendant's Exhibit No. 32 purports to be the amount of money paid to the Bunker Hill Mining and Concentrating Company for over-quota production at the Bunker Hill Mine from December, 1942, up to September, 1943, and it shows that the Bunker Hill Mining and Concentrating [120] Company was paid \$778,646.16 during that period for over-quota production, would you say that was correct?

Mr. Brown: If the Court please, I am objecting to this question and I move that the statement with respect to what the exhibit shows be stricken on

(Testimony of Wallace G. Wolf.)

the ground on what the production of the Bunker Hill Mine was,—this was not owned by the Sullivan Mining Company,—and it would be immaterial. I cannot see what it has to do with the question of receipt of premium price under the program put out by the Government to pay premium price for the purpose of stimulating the production of lead, zinc and copper,—I fail to see what that has to do with this suit.

The Court: I will admit it, the Court having control of this matter, I think perhaps I should let this evidence in then I can give it the weight I determine it is entitled to receive later.

Q. You have seen the figures, would you say that figure was, in your opinion, correct?

A. I would like to see that exhibit again, I wasn't able to grasp it at a glance. This exhibit shows the production from the Bunker Hill Mining and Concentrating Company, it shows where processed, and shows the other figures, as far as the Bunker Hill and Sullivan Smelter is [121] concerned I am unable to state whether those figures are correct or not, however, the tonnage of zinc shipped to the Sullivan Zinc Plant seems to be in order, yes, sir.

Q. And the amount shown at the end of that report or document, 700 and some odd thousand dollars, would you say that was in order also, for that period?

A. If the lead figures added to the zinc figures are correct, of course, the lead figure is quite a

(Testimony of Wallace G. Wolf.)

substantial one, and if that is correct probably this figure is correct, yes.

Mr. Brown: May I ask a question?

The Court: Yes, you may.

Mr. Brown: I understand that with respect to the production a good deal of that production shown on Exhibit No. 32 is lead production, that is, from the Bunker Hill Mine. Now, did I understand you to say that you had no knowledge of that, the lead production? A. I had no knowledge, none.

Mr. Brown: You did as to the zinc?

A. Yes.

Mr. Brown: I now renew my objection, if the Court please, particularly as to the lead production.

The Court: Yes, it is not to be considered in any matter as to the figure on the lead production. I will admit the other subject to the [122] objection made.

Q. Mr. Wolf, you have been handed Defendant's Exhibit No. 33, which are reports prepared by the Reconstruction Finance Corporation,—I would like to withdraw that, it is the Metals Reserve Company, Washington Office, relative to the total over-quota payments made to the Sullivan Mining Company during the greater portion of the time that the over-quota premium plan was in existence. I want you to review these figures and tell me if you feel those are substantially correct as to the total premiums?

A. I gather from this series of papers that they were the amounts that were forwarded to the Re-

(Testimony of Wallace G. Wolf.)

volving Fund. So far as it concerns the Sullivan Mining Company,—there is also in here in one instance, at any rate, at the top of the page the Bunker Hill Smelter,—now, as to the Bunker Hill Smelter I cannot testify as to whether those figures are substantially correct or not. This Revolving Fund for premiums wasn't handled directly by me, it was handled by our office and I presume that these were correct. I know that the Revolving Fund was increased from time to time as the premium price plan went on.

Q. There is a total of about \$10,000,000 that was paid out in connection with over-quota premium payments, so far as you know that is substantially correct?

A. I see no totals given here,— [123]

Q. —No, you are right, there isn't unless they are added.

A. So I am unable to state whether these are the correct figures or not.

Mr. Brown: Mr. Donahue, does this relate to the funds that were paid or passed through the Sullivan Mining Company hands as agent for the Reconstruction Finance Corporation or the Metals Reserve Company, that were paid to all of the shippers on the premium price plan. Is this an audit of the Revolving Fund that was handled for the Metals Reserve Company?

Mr. Donahue: It is my understanding that it consists entirely of over-quota payments.

Mr. Brown: Over-quota payments to whom?

(Testimony of Wallace G. Wolf.)

Mr. Donahue: To the Sullivan Mining Company who in turn paid the producers.

Mr. Brown: This does not represent the premium payment to the Bunker Hill and Sullivan Mining and Concentrating Company and the Sullivan Mining Company but funds that went through their hands to pay the other shippers.

Mr. Donahue: Their over-quota payments to the other shippers, that is my understanding. [124]

Mr. Brown: We have no objection to the exhibit with that explanation.

The Court: It may be admitted.

Q. You have Exhibit No. 3 which was handed to you, Plaintiff's Exhibit 3, and I am calling your attention to paragraph 2 of Plaintiff's Exhibit No. 3, which is the original contract agreement entered into on June 18, 1942,—that provides in that particular paragraph as follows: "We understand that due to the recent increase in production of zinc concentrates in your district, your existing smelter capacity is inadequate to treat the quantities of material being tendered to you; that you now have on hand your normal emergency reserve of material and do not feel warranted in purchasing for your own account for reserve, any additional material. In order to encourage the continued production of this material in your district, deemed necessary in the war effort, this company will purchase an amount of this material for a period of time, tendered to you in excess of your smelting capacity as hereinafter stated." Now, that sets out



(Testimony of Wallace G. Wolf.)

clearly one of the objectives of this contract. When did you expect to treat these concentrates that were put in originally, because of the fact that your own capacity was inadequate at that time, when did you expect to treat them? [125]

A. Well, that would be a difficult question to answer. We expected to treat this material as soon as we had capacity in the plant to be able to do so. Just when that would be, of course, would be a question of circumstances in the future.

Q. There was no definite understanding by anybody when that time might arrive?

A. No, not at that time, not under that contract at that time.

Q. Turning now to the second page of Plaintiff's Exhibit No. 3, I read you the following language: "You will stockpile, at your expense, such material so purchased on the property of your smelter at Silver King, Idaho." Now, there was no misunderstanding in anybody's mind at that time as to the fact that the Sullivan Mining Company, either to help the war effort or their own production in some manner did absolutely and positively agree to stockpile this material at their own expense?

A. That is true, but at the same time we considered that we were going to process that material.

Q. Now then, going down to the fifth and last paragraph on the second page of that agreement, I will read the following language of this contract:

(Testimony of Wallace G. Wolf.)

"We understand that you desire the material purchased here-under for our account to be sold to you from time to time as you [126] are able to treat same." Now, do you consider that a positive contractual agreement that the Metals Reserve Company had to sell that material to you?

A. I can only tell you my interpretation of that and I certainly understood that from this contract that since we were desirous of purchasing the material that we would treat the concentrates that we stockpiled.

Q. Is there anything in this agreement that says that, that you can find, Mr. Wolf?

A. My understanding of that language is "We understand that you desire the material purchased hereunder for our account to be sold to you from time to time as you are able to treat the same." That is my interpretation just as it says, it was to be sold to us to be treated.

Q. In other words, the Metals Reserve Company knew if you, at some time did become able to treat this material you might desire to purchase it?

A. The understanding was that we were going to treat this material that was being stockpiled.

Q. That is not what the agreement says?

A. Well, it is according to my understanding.

Q. Then you interpret that the Metals Reserve Company, when they state: "We understand that you desire the material purchased hereunder for our account to be sold to you [127] from time to time as you are able to treat same." You consider

(Testimony of Wallace G. Wolf.)

that a bonafide absolute contractual agreement to sell all of the stockpile to your company?

A. I can only answer that in the terms of my understanding at the time that it was entered into and my understanding was that the material purchased was to be treated by us.

Q. Now, turning to Exhibit A which is attached to that contract, and which is the last page, that is a storage and ownership certificate, is it not?

A. Yes.

Q. Of the Sullivan Mining Company? A. Yes.

Q. That is the method by which the concentrates were to be given over or held by the Sullivan Mining Company,—it is an ownership contract or certification? A. Yes.

Q. Now, this certificate, Exhibit A, provides and I am quoting: "The undersigned company hereby certifies that it has received and holds in storage on stockpile at its Silver King plant, Silver King, Idaho, for Metals Reserve Company, Washington, D. C., or order (blank) short tons of zinc concentrates described as follows, and that said zinc concentrates are owned by Metals Reserve Company or the holder hereof and will be released and delivered to the holder hereof upon surrender of this certificate properly [128] endorsed." Now, what was your understanding of what that Exhibit A meant?

A. My understanding of it was by these storage ownership certificates we described the concentrates, the quantity and these specific concentrates and that they were owned by the Metals Reserve Company

(Testimony of Wallace G. Wolf.)

and were and would be in the sole possession of the Metals Reserve Company and that we were responsible to see that they were kept intact so that we could account to the Metals Reserve Company for the concentrates.

Q. And what interpretation do you put on the words "and will be released and delivered to the holder hereof upon surrender of this certificate properly endorsed"?

A. I must say that at the time we entered into the stockpiling I didn't pay too much attention to the legal aspects of this matter and of the last three lines indicated, I understood, however, that these concentrates were the property of the Government and that we had to hold the property intact for the Government and take care of it and account for it.

Q. Mr. Wolf, this is a part of the contract and you agreed to release and deliver these concentrates to the holder of this certificate. If you agreed to that how did you expect to process these concentrates at some unknown future date? [129]

A. May I say that when we entered into this contract we didn't give this contract to any attorney to examine as to the legal phrases, we were dealing with men that my superiors were well familiar with and acquainted with and men who were outstanding in the mining industry and with my acquaintance of mining I understood that they were outstanding men, as far as I was concerned this was an emergency situation of the war and the Government wanted us to aid them in getting out more



(Testimony of Wallace G. Wolf.)

metal. That was the thing that we undertook here, to stockpile concentrates under the premium price plan and we went ahead and did it. To my knowledge this contract, at the time that it was signed was never turned over to any attorney for careful scrutiny as to its legal aspects or phrases contained in it.

Q. Then, as I understand your testimony, Mr. Wolf, you have tried to leave the impression that the Metals Reserve Company under the original contract in 1942, had no right whatsoever to remove these concentrates. From the wording of Exhibit A in the contract, will you now admit that interpretation is wrong?

Mr. Brown: Just a moment, I want to object to that, it is argumentative, Mr. Wolf has made the explanation of every point here as fast as he could [130] and as well as he could. I have refrained from making too many objections, however, I think this is improper cross examination and it is argumentative. I believe that your Honor will interpret the contract.

The Court: I will let him answer and I will consider your objection later, Mr. Brown.

A. Well, I am not an attorney and I am unable to give an opinion as to what that means. I will say this, my understanding of this when I read it and I didn't pay too much attention to the details, my understanding was that by this certificate we identified certain stockpiles of concentrates and when those concentrates were to be processed we



(Testimony of Wallace G. Wolf.)

delivered this certificate in order to properly account for the concentrates, to the Government.

Q. The certificate was held by the Metals Reserve, was it not?

A. Yes, it was held by them to identify the concentrates which we were holding for their account.

Q. And the certificate provided that they would be released by you to anybody holding the certificate?

A. I had in mind that they would be released to us for processing and that we would account for them as they were released to us.

Q. I understand that is what you had in mind at that time [131] but that apparently is not the fact of this contract.

Mr. Horning: Now, if the Court please, that is certainly argumentative.

Mr. Donahue: Perhaps so, I will not pursue that any further.

Q. Now, Mr. Wolf, calling your attention to Plaintiff's Exhibit No. 6 which you have in your hand, and which is dated July 12, 1944, that is the contract or rather the amendments to the original contract, is that what that is? A. Yes.

Q. Now, in a general way, what was the purpose of this amendment?

A. Do you wish my thoughts at the time the amendment was received by me?

Q. Yes.

A. Well, we were informed by previous correspondence that the original contract was one of the

(Testimony of Wallace G. Wolf.)

earliest ones that had been signed. As a result of that it wasn't in conformity with later contracts and the Metals Reserve Company wanted to bring it in to conformity with other contracts with other companies. Here again when this contract was received by me I viewed it in the light of those facts and I didn't pay too much attention to the legal features. This amendment was never submitted [132] to any attorney for any legal scrutiny again, and as far as I was concerned it was to do just what they requested, to bring it in conformity with other contracts and as such it was okay with me.

Q. There has been some testimony here by yourself, that the Sullivan Mining Company was absorbing most of the low grade zinc concentrates, and that the Metals Reserve Company was getting advantage of having higher grade stockpiled in their stockpiles. I think you made reference to some 80 or 85 per cent of the low grade which you stated was held to your account and only 15 by the Metals Reserve Company, is that correct?

A. I think that was stated in our discussion with the Metals Reserve Company when this question of receipts by us of sub par zinc concentrates was discussed.

Q. And that was discussed in answer to a question by Mr. Brown, that is, testimony along that line was given?     A. Yes, I think so.

Q. The amendment of July 12, 1944, Plaintiff's Exhibit No. 6, paragraph 4 of that Exhibit provides: "It is expressly agreed that at no time shall

(Testimony of Wallace G. Wolf.)

the proportion of low grade material, that is, material containing less than 47 per cent zinc, purchased and stockpiled for our account exceed, with relation to the total [133] tonnage contained in our stockpile, the proportion of such low grade material contained in the total tonnage constituting the stockpile maintained for your own account at your Silver King smelter. In other words, both you and ourselves shall maintain, giving due effect to the aggregate quantities stockpiled for our respective accounts, the same proportionate amount in stockpile of such low grade material." That was one of the purposes of entering into this amendment, it was to work out that low grade proposition, was it not?

A. It came in, incidental to the amendment, yes, sir.

Q. That, along with Plaintiff's Exhibit 8 which was a letter dated July 20,—I guess that was Exhibit 7,—which was a few days subsequent to this, that fixed up the situation so that no one was to get any the worse of the low grade part of the stockpile, wasn't that correct?

A. The situation actually gave the zinc plant the worse of the low grade situation because we were processing the majority of the low grade material and stocking the higher grade for the Metals Reserve Company. So far as the economic outcome to the zinc plant was concerned, because of the difficulty in processing and the metalurgy of treating lower grade material,—the cost of treating low

(Testimony of Wallace G. Wolf.)

grade material and the recovery of metal from the low [134] grade material is, of course, lower than from high grade material and the zinc plant was suffering. As I stated in earlier testimony, we were processing this low grade material because of the concentrate situation,—because of the stockpile situation and we were endeavoring to do the job for the war effort. That was my contribution as superintendent of the zinc plant to help with the war effort, that is the reason I did it. It made the operation at the zinc plant very much more difficult because of the excessive amount of low grade material we were putting through.

Q. What do you call low grade material, what percentage?

A. That material that was coming from the Pine Creek area, from the Spokane-Idaho, which contained 35 to 37 per cent zinc and up to 20 per cent lead, 15 per cent iron and was high in insoluble. That was difficult to process in the electrolytic zinc plant.

Q. There was no reason why you couldn't have a proportionate share of this low grade material into the Metals Reserve stockpile?

A. They only permitted a certain percentage, that was the difficulty, they told us there was a limitation of the amount they would accept for stockpiling.

Q. You didn't have to buy this low grade material? [135]

A. We could have shut down the producers that

(Testimony of Wallace G. Wolf.)

were producing this low grade material but I for one didn't want to do that.

The Court: At this time we will recess for 15 minutes.

November 3, 1953, 3:15 o'clock p.m.

Q. I believe you have Plaintiff's Exhibit No. 9. Do you see a letter there dated August 13, 1946, to the Sullivan Mining Company from the Metals Reserve Company? A. Yes.

Q. Now then, calling your attention to the third paragraph of that letter, it starts, and I am quoting: "Up to the present time approximately 60,000 tons of concentrates have been stockpiled for our account, but so far no withdrawal of concentrates for treatment has been made. We now consider it appropriate to convert our concentrates into zinc metal and would appreciate your informing us as to whether you are able to begin treatment of such concentrates at your plant for our account. Please advise us as soon as possible what monthly tonnage you can treat and on what terms." It is a fact, is it not, that after you received that communication from the Metals Reserve Company you analyzed the situation and knew that you could not possibly treat any concentrates at that [136] time?

A. That is true, the reply mentioned that we were able to operate only two of our three electrolytic cell units because of lack of adequate labor, and we go on to state in that letter: "Excess concentrates receipts above the tonnage possible to



(Testimony of Wallace G. Wolf.)

process is continuing as a result thereof." We went on and mentioned that with the beginning of the Fall when labor would come in from the woods and the farm work that we hoped to be in a better position.

Q. This was the first request or the first time that there was a direct request by the Metals Reserve Company that you start treating the concentrates?

A. Yes, as I recall, that was the first request.

Q. Do you have a letter there dated August 20, 1946, from the Sullivan Mining Company to the Metals Reserve Company?      A. Yes.

Q. Quoting from that letter, on the second page: "Whether or not we shall then be able, at maximum plant capacity, to begin treatment of zinc concentrates stored for your account is depended upon the tonnage of concentrates tendered to us currently for purchase since it is very probable that such tonnage will be increased by reason of greater labor supply becoming likewise available to [137] the mines in this district who are now, like ourselves, seriously undermanned." Now, it is a fact, isn't it, that if the labor situation had improved the output of metal from other mines would increase and the stockpile would become larger because of better labor condition even because of better labor market you are able to run your plant at full capacity, in other words, your concentrates would increase in amount and one would practically offset the other, is not that right?

(Testimony of Wallace G. Wolf.)

A. That is true, as labor became available more men would be employed at the mines and the production would increase from the mines and we would no doubt get increased tonnage at the plant.

Q. In the last paragraph of that letter, and I am quoting: "In this connection we are unable to determine from your letter of August 13, 1946, if you desire for us to process the concentrates stored for your account on a toll basis returning to you the zinc metal resulting from the processing or if you desire us to purchase such material on the same basis as all our other zinc concentrate receipts, the resulting metal therefrom being retained and sold by us for our own account. We will appreciate your advice in this respect." In answer to that letter,—I am not referring to any exhibit now,—however, it is a fact that the Metals Reserve Company [138] indicated that they would be perfectly willing to have the concentrates handled on a toll basis, if you were able to do that, is that true?

A. This letter was written by Mr. Haffner and my recollection right now,—well, I don't remember this question of toll treatement having been brought up at all.

Q. That arrangement would have been perfectly satisfactory if you had the ability to treat them at all, to process them?

A. Yes, I think so, if the Government had wished us to return the metal to them for their purposes I believe that we would have been perfectly willing to do it.

(Testimony of Wallace G. Wolf.)

Q. Calling your attention to Exhibit No. 11, there is a letter there from the Sullivan Mining Company which is signed by yourself, to the Metals Reserve? A. Yes.

Q. Calling your attention to the last paragraph of that letter you state: "When the subject agreement was entered into it was contemplated that the stockpiled concentrates would eventually be processed in our plant, which would derive the benefits accruing therefrom including processing margin. Since the stockpiled concentrates are now to be shipped elsewhere we contend that we should be reimbursed for the substantial out-of-pocket expenses of this stockpiling and we trust that [139] you will take appropriate action that we may receive equitable consideration under these circumstances." That is a letter which you sent to the Metals Reserve Company? A. Yes.

Q. And that was quoting directly from that letter? A. Yes.

Q. Now, Mr. Wolf, do you have any explanation as to why, if you were depending on the amendment of the contract of 1944 for reimbursement,—can you tell me why you didn't refer to the amended contract instead of asking for equitable consideration,—you are familiar with the amendment, are you not?

A. I am, but by the original contract and the amendment I always understood that it was contemplated that we were to purchase the concentrates and to process the stockpiled concentrates, and if

(Testimony of Wallace G. Wolf.)

we were to process those concentrates we would have been willing to absorb all of the cost of the stockpiling because of the profit resulting from the processing of those concentrates, but when they came to be removed elsewhere then it became a question of out-of-pocket expenses of stockpiling the concentrates for the Government and I thought that we should receive some reimbursement for that.

Q. I understand that but according to what I observe, in [140] this complaint which you filed against the Reconstruction Finance Corporation, you are depending for your reimbursement, to a considerable extent, upon paragraph two of the amendment to the contract which provides: "If this company should for any reason remove material from stockpile for any purpose other than for sale to you, you will be reimbursed for actual out-of-pocket expense incurred in connection therewith upon receipt from you of your signed statement reflecting the nature of each item of expense or cost and summarizing the work performed to which the charges apply." I am wondering why, when you wrote this letter, you didn't refer to that paragraph of the amended contract if you were depending on that for your right to receive payment?

A. In reply to that I might state again that I am not an attorney. I had in mind and thought that the amendment or the amended contract called for our reimbursement of out-of-pocket expenses if the concentrates were to be removed and not processed by us.

Q. Then why in this letter of March 11, 1948,



(Testimony of Wallace G. Wolf.)

which is Exhibit No. 11, did you use the language, and I am quoting: "We trust that you will take appropriate action that we may receive equitable consideration under the circumstances"?

A. In writing that letter I was pointing out that the [141] concentrates, which I had always thought were to be processed by us, was to be shipped elsewhere and I was calling their attention to the fact that I thought we should receive our out-of-pocket expenses. I called that to their attention.

Q. Then you were not depending, at that time, upon the amendment to the contract for payment?

A. I don't know just what you mean by that.

Q. You felt that you had payment coming?

A. Yes.

Q. Because these concentrates were going to be removed some place else, that is correct, is it?

A. Yes.

Q. The original contract agreement provided that the stockpile should be maintained at no cost to the Metals Reserve Company, is that right?

A. Yes, with the understanding that we were to process the concentrates.

Q. Is there anything in the original contract that gives you the right to process the concentrates, the exclusive right?

A. I don't know about the language but so far as I was concerned the intent was for us to process the concentrates.

Q. Well, we have discussed that and I don't think there [142] is any use of arguing any fur-



(Testimony of Wallace G. Wolf.)

ther, but apparently when you wrote this letter of March 11 you had forgotten about the amendment to this contract and you were not depending on it at all?

A. The amendment to the contract as I interpreted it gave us the right to out-of-pocket expenses if the concentrates were removed elsewhere for processing.

Q. And with that understanding, you completely failed to recognize that amendment or to make any reference to it when you made your first request for payment?

A. In this letter I was calling this to their attention and, as I say, not being a lawyer, that is the best that I did.

Q. But you could have called to the attention of the Metals Reserve Company the amended contract just as easily?

Mr. Brown: Now, we object to that again as argumentative.

Mr. Donahue: I will withdraw the question.

The Court: It seems most of this examination is argumentative.

Q. I want to call your attention to a letter dated May 10, and designated as Plaintiff's Exhibit 13,—that is [143] May 10, 1948, and I am quoting from the last paragraph of that letter: "This company entered into the stockpile agreement AA-29 as a wartime action because of considerations of national security and with every supposition and belief that the stockpiled zinc concentrates would be processed

(Testimony of Wallace G. Wolf.)

eventually at this plant. This is stressed and emphasized in the first paragraph of your letter quoted above. We consider, therefore, now that those concentrates are to be shipped elsewhere, that your decision above quoted is inexcusably arbitrary and high-handed and a gratuitous imposition on the company's cooperation that prevailed during the time of national crisis, and we believe that the Reconstruction Finance Corporation, as a responsible governmental agency, cannot hold itself aloof from that aspect of the matter but should reimburse this company for expense incurred in stockpiling. We believe that the matter deserves a more realistic attitude, one that is fair and equitable, and we hope that your decision may be reconsidered accordingly." When you wrote or put that language into this letter, was there any reason why, if you were depending on the amendment of July of 1944 for payment, why you couldn't have referred to it?

A. The same answer that I gave to previous questions can be given here. That was a fair statement of my position [144] and what I thought about the thing. I never referred to the particular amendment because I thought that the original contract and the amendment gave us the right to stockpile the concentrates and if the concentrates were to be removed we were to be reimbursed for our out-of-pocket expenses. We stockpiled those concentrates and we were under considerable expense. From my standpoint I did not see what the zinc plant gained if the concentrates were to be

(Testimony of Wallace G. Wolf.)

shipped elsewhere and we were to be out-of-pocket for all of the expenses that we had undergone in the stockpiling.

Q. But you could have very easily referred to paragraph two of the amended contract if that is what you were basing the right of payment on?

Mr. Horning: Now, we object to that again as argumentative,——

Mr. Donahue: ——I will withdraw the question.

Mr. Horning: ——He is asking why he, a laymen, didn't do what a lawyer might have done.

The Court: He has withdrawn the question, go ahead.

Q. Now, calling your attention to Plaintiff's Exhibit No. 16, which is a letter dated July 15, 1948, from the Sullivan Mining Company to the Metals Reserve Company, [145] and I am referring to the last page of that exhibit which is a statement for maintenance of zinc concentrate storage bins, June, 1942, through November, 1946. That statement indicates that the total tons stored for Metals Reserve was 65,501.2630 tons, that is correct, is it?

A. Yes, I think so, that was compiled and I think it is a correct statement.

Q. And at that time you were willing to settle this entire situation for that amount, that is, the amount shown, \$27,310.29?

A. No, this was in answer to a letter which they advised us,—they stated that they would give consideration to certain repairs to the stockpiles and the question of preserving the material. This state-

(Testimony of Wallace G. Wolf.)

ment was gotten out, it was prepared and given to them to show what the cost of the stockpile bins and maintenance of the bins themselves was, and it was not the entire figure because in the smelter cost there is no cost for crane service for loading and unloading the concentrates, it was simply to show what the actual cost of the bins was.

Q. Did you consider this an offer settling this matter, an offer to the Metals Reserve Company?

A. No, this was simply showing them what the cost of the bins was and it was in answer to their inquiry, it was informative and it was not a bill tendered to them. [146]

Q. That is what I want to know. When did you first tender a bill to the Reconstruction Finance Corporation for your claim concerning the input and the output?

A. I am not able to answer that question, that was in the hands of my superiors and I do not know.

Q. Do you know whether Reconstruction Finance Corporation was ever tendered a bill?

A. Yes.

Q. Do you know the amount of it?

A. Well, I do know that Mr. Haffner and I and Mr. Ince in February of 1950 went to Washington and discussed with the Bureau of Federal Supply and discussed with the Reconstruction Finance Corporation this question of the amount of our cost and at that time to both of those agencies we discussed the amount of our bill, yes.



(Testimony of Wallace G. Wolf.)

Mr. Donahue: If the Court please, I have an explanation to make in connection with a proposed exhibit. The exhibit consists of the making of a claim for reimbursement to the Reconstruction Finance Corporation for the establishment and the maintaining of these stockpiles. The letter is dated in February, 1951, and is in a letter which came from a law office in Washington, D. C. There are letters from Mr. Haffner, Mr. Easton and numerous other parties which go no further than to give their opinion of what [147] they thought they should receive. The only purpose is to show that a claim was presented to the RFC on this date and I am asking the Court to permit me to offer the first page of that letter which is the claim itself and the amount which is an exhibit signed by Mr. Wolf at the end of it and leave out the rest which is a letter signed by the attorney in Washington.

Mr. Horning: I don't think that a portion of a letter, with some unknown part omitted, should be offered. I think that if the rest of the letter was shown or the rest of the exhibit it would appear that this was a matter that was attempted at that time to be compromised. I don't believe that it would be proper if a compromise offer had been made and the parties had not gotten together,—

The Court: —I think possibly Mr. Donahue would let you look at the balance of the correspondence there and that may make some difference.

Mr. Brown: May we have a little time to look at this, it is quite lengthy.



(Testimony of Wallace G. Wolf.)

The Court: It may be that we could hold this in abeyance until morning and go ahead with some other phase of the matter.

Mr. Brown: If that could be done then we could look this over during the evening. [148]

The Court: Very well, could you go ahead, Mr. Donahue?

Mr. Donahue: Yes, I can.

Q. You don't recall, do you, when any bill was presented to the Reconstruction Finance Corporation with reference to this?

A. I don't recall the date when a bill was presented to them. I do recall that the question of the amounts was discussed on February 17, 1950, in the office of the Reconstruction Finance Corporation and the Bureau of Federal Supply.

Q. You were not present?

A. Yes, I was present.

Q. At that time isn't it a fact that you made a claim against the Reconstruction Finance Corporation for the stockpiling of 19,224 tons of wet concentrate at a cost of \$14,595.39. If you are not familiar with these figures I don't want you to answer, but if that is approximately correct we can save a little time.

A. That is correct, at the time of this session in Washington, the Bureau of Federal Supply said that for their portion they were willing to agree to the bill that was tendered to them,—the amount that we discussed, there was no formal bill tendered. They asked me to prepare a statement show-

(Testimony of Wallace G. Wolf.)

ing the cost and [149] I said that I would prepare such a statement on my return to the plant, which I did and sent to them. Following that we went to the Reconstruction Finance Corporation office and there we were rebuffed for their portion and were told that they would not pay.

Q. At no time did you present a bill or make a demand upon the Reconstruction Finance Corporation for the total amount of \$54,864.10 that you allege is due, in your complaint, is that correct?

A. No. I don't think that is correct because our claim was for the entire amount of the bill and it was just a question as to what agency of the Government should pay or should they pay proportionate parts.

Q. From your best recollection, is it not a fact that at all times previous to the time that you started your lawsuit, you only called on the Reconstruction Finance Corporation to pay approximately \$14,000.00 and you were requesting the Bureau of Federal Supply to pay the balance of \$54,000.00?

A. My recollection was that the matter of the payment in the earlier portion, that is, prior to the time the Bureau of Federal Supply took over was in dispute between two Bureaus and until that dispute was settled, as far as I was concerned, I did not know which branch of the Government would pay what, but the total amount of the [150] bill was discussed with them.

Q. Mr. Wolf, are you familiar with this assign-

(Testimony of Wallace G. Wolf.)

ment made from the Reconstruction Finance Corporation to the Bureau of Federal Supply, Treasury Department, which has been introduced as Exhibit No. 22?

A. Yes, I recall we received such an assignment.

Q. Did you ever give it any particular consideration?

A. The consideration that I gave it, from a personal standpoint, was the fact that the stockpiled concentrates were to be assigned from one branch of the Government to another. I acknowledged receipt of the assignment on that basis.

Q. You did acknowledge receipt of the assignment?

A. Yes.

Q. Calling your attention to Plaintiff's Exhibit No. 18, which is a letter dated November 9, 1948, directed to the Sullivan Mining Company by Mr. T. J. Doherty, and I am quoting from paragraph No. 2 of that letter: "Accordingly, you are requested to accept this letter as a release of all material remaining in stockpile to Treasury Department, Bureau of Federal Supply, effective as of the close of business November 30, 1948. In accordance with the above, all charges incurred in connection with this material will be for the account of and you will bill such charges to the Bureau of Federal Supply, effective as of December 1, 1948. [151] Our legal division is arranging to assign the underlying contract involved in this storage operation." You are familiar with that letter and approved it on behalf of the Sullivan Mining Company?

(Testimony of Wallace G. Wolf.)

A. I don't see any approval.

Q. Isn't there an approval in the left-hand corner of the second page on the bottom?

A. Not in this, no.

Q. I call your attention to the last paragraph of that letter: "We ask that you indicate your understanding and acceptance of the above by signing and returning the attached copy of this letter." Do you see that?

A. Yes.

Q. And your signature appears on the left-hand side where you acknowledge it?

A. It is not here.

Mr. Donahue: May I approach the witness?

The Court: Yes, you may.

Q. I will ask you,—by way of explanation I will state that I have a photostatic copy of this letter which was apparently prepared after your acceptance of it,—to shorten this up, do you recall that you agreed to this by signing your name to it?

A. No, my recollection is that this letter coming with the assignment, I simply acknowledged receipt of it. There [152] may have been something subsequent but I don't recall it.

Q. Mr. Wolf, Defendant's Exhibit No. 35 has been handed to you, now, if you will turn to the second page I will ask you whether that does not state: "We ask that you indicate your understanding and acceptance of the above by signing and returning the attached copy of this letter", and whether that is a photostatic copy of your signature at the bottom?

A. Yes, it is.

(Testimony of Wallace G. Wolf.)

Mr. Donahue: I offer this in evidence.

Mr. Brown: We have no objection.

The Court: It may be admitted.

Q. By the way, Mr. Wolf, what has been done with those bins up at the Sullivan Mining Company since the stockpiling agreement ended June, 1947?

A. Some of the bins have been used for stockpiling zinc concentrates, that I know of. We have had, since that time a maximum storage of concentrates in tonnage of some 12,000 tons. I do not know whether the Bunker Hill smelter has used some of their bins, but I imagine that some of the earlier bins used originally by the Bunker Hill Smelter are not being used by them, however, I am not sure of that. The remaining of the bins, the larger bins, are just standing there. [153]

Q. Are they being used at all at the present time,—what you call the remaining bins, do you use them off and on?

A. Just a few of those bins, the maximum concentrates in tonnage, as I recall, that we have had in bins, in stockpile, on the Bunker Hill smelter ground, is about 12,000 tons and to that extent we have used some of the bins that we used before to store the concentrates for the Metals Reserve Company and the Sullivan Mining Company concentrates.

Q. In other words, these bins are still of considerable use to your company, is that correct?

A. No, I would not say so because here is what happened, those bins were built by laying wood fills on the ground and then laying a plank floor and



(Testimony of Wallace G. Wolf.)

then the bins were separated by partitions and when the bins are empty and stand in the summer sun the boards warp and crack and if the bins were to be used again much of the lumber would have to be replaced because of the warping and the drying out and the checking of the lumber.

Mr. Donahue: I think that is all.

The Court: Do you have any redirect?

Mr. Brown: Yes, we do.

The Court: Then you may proceed. [154]

### Redirect Examination

Q. (By Mr. Brown): Mr. Wolf, you may have given this information but I am not sure. There was considerable questioning of you concerning the fact that concentrates from the Sullivan Mining Company's Star Mine went into the Government stockpile, was there any benefit to your company in placing those concentrates into the Government stockpile?

A. None whatever, particularly because we never processed them. The advantage to the zinc plant is in processing high grade material and we consider concentrates from the Star Mine to be **high grade** material.

Q. Did you ever receive any objection from the Metals Reserve Company or the Reconstruction Finance Corporation as to the quantity of concentrates from the Star Mine placed in the Government stockpile?      A. No.

Q. Exhibit No. 33, as I understand it, sets forth

(Testimony of Wallace G. Wolf.)

the premiums that were handled by you as agent for the Metals Reserve Company in a Revolving Fund. What is the fact as to whether or not all of the domestic producers of zinc concentrates who were shipping to you, were receiving premium price payments on their concentrates?

A. Yes, to my recollection they were all receiving premium [155] prices on the quotas they had.

Q. In other words, the Sullivan Mining Company wasn't in any different category than other shippers shipping to your plant so far as premium prices were concerned?

A. If you mean by the Sullivan Mining Company, the Star Mine, it was in exactly the same category as other shippers.

Q. Exhibit No. 6, which is the modification of the original agreement, Exhibit No. 6 being the Government letter of July 12, 1944, to you, as a modification of the contract. Prior to the modification letter of July 12, 1944, Exhibit No. 6, had you ever had any notice from the Metals Reserve Company or the Reconstruction Finance Corporation that they proposed to remove any concentrates from that stockpile? A. No.

Q. Was that the first indication,—the modification of the contract, was it the first indication that you had that concentrates might be removed from the stockpile? A. That is true.

Q. You have been handed Exhibit No. 13. You were examined at some length concerning Exhibit No. 13 and the fact that in that letter you did not

(Testimony of Wallace G. Wolf.)

make specific reference to the contract and asked for equitable consideration and refer to the arbitrary decision of the Reconstruction Finance Corporation. I will ask you, and I refer to [156] Exhibit No. 12, if your letter, Exhibit No. 13, was in response to a letter from the Reconstruction Finance Corporation dated April 26, 1948, Plaintiff's Exhibit No. 12, in which the following statement appears: "By amendment, it was provided that smelters where such stockpiles existed would be reimbursed for actual out-of-pocket cost incurred in connection with removing tonnage from stockpile for any purpose other than sale to the smelter at which the stockpile was located. In view of this we do not believe we should be called upon to pay any expense for establishing the stockpile or for unloading materials into the stockpile." Was your letter, Plaintiff's Exhibit No. 13, in response to that ruling?

A. Yes, because in my letter of May 10, I refer to that letter of April 26.

Q. Mr. Wolf, I refer to Exhibit No. 16 which I have in my hand and which I will show you later,—Mr. Donahue asked you particularly with respect to that and to the fact that the breakdown of costs show tons storage for the Metals Reserve Company at 65,000 and some odd tons. I will ask you if that was the amount stockpiled to Reconstruction Finance Corporation and to which I believe you replied "yes". Now, are those dry tons or wet tons? A. Those are dry tons. [157]

(Testimony of Wallace G. Wolf.)

The Court: I will adjourn at this time until 10:00 o'clock tomorrow morning.

November 4, 1953, 10:00 o'clock a.m.

Mr. Brown: Counsel yesterday tendered an exhibit to which we objected. We will withdraw that objection if the entire exhibit goes in. We do not think that part of the exhibit should go in, however.

Mr. Donahue: May it please the Court; the portion of the exhibit that I want to introduce consists only of a letter dated February 13, 1951, directed to the Reconstruction Finance Corporation in which the Sullivan Mining Company make a demand or tender a bill to the Reconstruction Finance Corporation for \$14,000.00. Immediately following the first page of this tender they attach a breakdown showing the proportionate share due from the Reconstruction Finance Corporation as they claim, which makes up this \$14,000.00 claim. That statement or breakdown is signed by Mr. Wolf, and this demand for payment on the Reconstruction Finance Corporation is made by the law firm of Shinn, Grimes, Harlan, Strong and Carson, who counsel will admit, I am sure, are the duly authorized representatives of the Sullivan Mining Company at Washington. This letter is signed [158] by Mr. Harlan, one of the members of the law firm. In connection with presenting this claim Mr. Harlan writes what is practically a brief covering the entire situation, in fact, he includes in this letter excerpts from many of the exhibits admitted here

(Testimony of Wallace G. Wolf.)

in evidence, but on top of that Mr. Harlan in presenting this claim has included in it a letter from Mr. Eastman in which he gives his opinion as to what the parties understood, which I think is entirely self serving and would be inadmissible in evidence. He includes in this claim a letter from Mr. Hanley in which he gives his opinion as to the interpretation of the contract and that, again, is self serving and opinion evidence and is something that should be left to the discretion of the Court. He includes a letter from Mr. Haffner in which he gives an opinion as to what the interpretation of the contract should be and that is purely self serving. He also includes a letter from Mr. Wolf and in that Mr. Wolf goes into great detail as to what his opinion is and it is entirely self serving, and then to end it up before we get to the signature Mr. Harlan gives his opinion as a lawyer, and that again is entirely self serving and is inadmissible as evidence. I am going to hand to your Honor this claim which is made up in detail and of which I desire only to have introduced the first page and the breakdown of the [159] amounts. I have those prepared which I think is the only thing admissible in this case. I have these by way of a photostatic copy and I am asking your Honor to admit only three pages of photostatic copy or to admit the first three pages of this voluminous claim and to eliminate the rest from your Honor's consideration. I would like to hand them to your Honor for your examination and consideration.



(Testimony of Wallace G. Wolf.)

will be for the account of and you will bill such charges to the Bureau of Federal Supply effective as of December 1, 1948. Our Legal Division is arranging to assign the underlying contract involved in this storage operation."

Q. After December 1, 1948, did you incur any charges in connection with the stockpile?

A. No, we did not. [162]

Q. You received the assignment mentioned there and which has been admitted in evidence?

A. Yes, we did.

Q. Were you ever requested by the RFC to approve that assignment?      A. We were not.

Q. Did you ever approve that assignment?

A. No.

Mr. Brown: I think that is all.

#### Recross Examination

Q. (By Mr. Donahue): You have been handed Plaintiff's Exhibit No. 22, will you state what that is?

A. This is a letter under date of December 21, 1948, from the Reconstruction Finance Corporation office of War Activity Liquidation, and it is addressed to the Sullivan Mining Company——

Q. ——Excuse me, is that Exhibit No. 22?

A. Yes.

Q. Is there more than one in that exhibit?

A. Yes. There is a letter from the Reconstruction Finance Corporation and my reply.

Q. Will you tell me what both of them are?

(Testimony of Wallace G. Wolf.)

A. The letter from the Reconstruction Finance Corporation says: "Enclosed herewith please find counterpart of [163] assignment executed as of November 30, 1948, by Reconstruction Finance Corporation and accepted and agreed to under date of December 1, 1948, by United States of America, Treasury Department, Bureau of Federal Supply. You will note the assignment covers the captioned contract, as amended, between Metals Reserve Company and yourselves. Please acknowledge receipt of this instrument which you may retain in your files. As you have been heretofore informed by us, the assignment was made in connection with the transfer to the Bureau of Federal Supply of certain material held in storage by you under said contract." That is signed by T. J. Doherty. My reply is under date December 27, 1948, addressed to the Reconstruction Finance Corporation and states: "Receipt is hereby acknowledged of your letter of December 21, 1948, with enclosures of counterpart of the assignment executed as of November 30, 1948, by Reconstruction Finance Corporation and accepted and agreed to under date of December 1, 1948, by United States of America, Treasury Department, Bureau of Federal Supply, said assignment covering the captioned contract, as amended, between Metals Reserve Company and Sullivan Mining Company."

Q. Now, previous to the time you wrote that letter you had received either one or more communications from the [164] Reconstruction Finance

(Testimony of Wallace G. Wolf.)

Corporation that this assignment was being prepared and would be mailed to you?

A. That is correct.

Q. After you received this assignment in your office and wrote this letter which is a part of Exhibit No. 22, did you ever in any way or in any manner or at any time object in any way to that assignment being made to the Treasury Department, Bureau of Federal Supply?

A. I did not, I simply thought that it was a part of the official documents necessary for this physical transfer of this stockpile from one agency of the Government to another.

Q. As a matter of fact, after this assignment was made in December of 1948 you had numerous dealings with the Bureau of Federal Supply, Treasury Department, relative to the stockpile, did you not?

A. Yes, we did.

Q. As a matter of fact, Mr. Wolf, in the month of February, 1951, you went to Washington, D. C., and went to the Bureau of Federal Supply, Treasury Department, with reference to your claim, before you ever went to the Reconstruction Finance Corporation?

A. That is correct.

Q. And you made demand at that time upon the Bureau of Federal Supply, Treasury Department, for payment of approximately \$40,000.00 of the claim that you now [165] set up in this suit?

A. Yes, sir, with the understanding—

Mr. Donahue: You may answer that yes or no.

(Testimony of Wallace G. Wolf.)

Mr. Horning: I think you should let him explain his answer.

A. With the understanding that——

Mr. Donahue: ——I want a yes or no answer unless the Court rules otherwise.

The Court: I will let him answer yes or no and then he may explain his answer, I believe he has already answered yes.

A. With the understanding that we were going to the Reconstruction Finance Corporation and discuss with them the question of payment for this stockpiling.

Q. As a matter of fact, when you went to see the Reconstruction Finance Corporation after you saw the Bureau of Federal Supply you only made demand on the Reconstruction Finance Corporation for payment in the amount of \$14,595.39, is that not correct?

A. Yes, because we had received information from the——

Q. ——Will you answer that yes or no, that is the only demand made on the RFC, is that right?

A. Yes.

Mr. Brown: The witness has answered [166] yes, now may he explain?

Mr. Donahue: Okay, let him go ahead.

A. We informed them that the Bureau of Federal Supply had been willing to pay a part of this claim and we then went to the Reconstruction Finance Corporation to see if they would not also be willing to pay.

(Testimony of Wallace G. Wolf.)

Q. When you say a part of the claim, I am now calling your attention to paragraph 8 of your complaint and it reads as follows: "That between August 9, 1944, the date of this contract modification, and December 1, 1948, said Metals Reserve Company and Reconstruction Finance Corporation removed 19,224.06 tons on said zinc concentrates stockpiled by the plaintiff upon which the plaintiff had incurred actual out-of-pocket expense in the sum of \$14,595.39 and subsequent to December 1, 1948, the defendant, Reconstruction Finance Corporation, removed or caused to be removed 53,039.58 tons of such stockpiled concentrates upon which the plaintiff had incurred actual out-of-pocket expense in the sum of \$40,268.71." Those are the allegations or rather that is an allegation of your complaint and I am now asking you if it is not a fact that the demand you made upon the Bureau of Federal Supply, Treasury Department, was for this \$40,268.71 representing your claim of out-of-pocket expenses on the removing of the concentrates after [167] November 30, 1948, isn't that a fact?

A. My understanding of the discussion that we had——

Mr. Donahue: ——I would like to have you answer my question rather than give me your understanding. I asked a direct question.

A. I would have to answer the question no, because in our discussion with the Bureau of Federal Supply the question of the entire cost was discussed with them and they indicated their willing-



(Testimony of Wallace G. Wolf.)

ness to pay the cost that we incurred after this date of December 3, 1948.

Q. They indicated they would pay 40 odd thousand dollars? A. Yes, sir.

Q. And then you went to the Reconstruction Finance Corporation to find out if they would pay the balance of approximately \$14,000.00?

A. That is correct.

Q. You never at any time made any demand upon the Reconstruction Finance Corporation for payment of this entire claim, did you?

A. At the time of the——

Q. Just answer that yes or no, if you please?

A. I think we did make a demand.

Q. Have you any correspondence or anything in your files that would show that you ever made any demand upon the Reconstruction Finance Corporation prior to this lawsuit for [168] \$54,000.00?

Mr. Horning: That is objected to as repetition, it was all gone into yesterday.

The Court: I know it was.

Mr. Donahue: But it was opened up again this morning.

The Court: I don't think it was but I will let him answer.

Q. You may answer that question, if you know?

A. I am uncertain as to that; I cannot answer yes or no with any certainty.

Q. You have nothing in your records, no correspondence to show that you made any demand upon

(Testimony of Wallace G. Wolf.)

the Reconstruction Finance Corporation for payment of any sums that became due because of the removal of concentrates after December 30, 1948?

A. The work that was done by our company——

Q. ——I am just asking if you have any correspondence in your files that indicate that such demand was ever made, you can answer that yes or no.

A. I cannot answer yes or no with certainty but I can explain that subsequent to this the question of the claim was taken up by my superiors through Mr. Harlan in Washington and that was outside of my province, I didn't follow it too closely and so I am not too conversant with it. [169]

Q. Mr. Harlan is the representative of the Sullivan Mining Company or was the representative of the Sullivan Mining Company in February of 1951?

A. Yes, for this particular subject he was.

Q. You may not know this, Mr. Wolf, but I will ask, I am reading from a letter that was addressed to the Reconstruction Finance Corporation on February 13, 1951, re Sullivan Mining Company claim for reimbursement for inbound costs in connection stockpiling zinc concentrates under contract AA-29 as amended. I am only going to read from portions of it, it was signed by Mr. Harlan and goes on,——

Mr. Horning: ——Now, if the Court please, we object——

The Court: Let him go ahead, I want this entire matter to go in if he desires it.

Q. It goes on: "In accordance with the understanding reached October 31, at the meeting held

(Testimony of Wallace G. Wolf.)

in the office of Mr. Harold W. Sheehan, counsel, Reconstruction Finance Corporation, at which Mr. Harold W. Sheehan and Mr. T. J. Doherty, representing Reconstruction Finance Corporation, and Mr. Charles R. Ince and the undersigned, representing the Sullivan Mining Company, were present. I hereby make claim, on behalf of the Sullivan Mining Company for reimbursement in the sum of \$14,595.39 covering the proportionate [170] share of the total inbound stockpiling costs applicable to the 19,224.0600 wet tons of zinc concentrates which were removed from Sullivan Mining Company stockpile, for shipment to Anaconda Copper Company prior to December 1, 1948.

“There is attached a signed statement reflecting the nature of each item of expense and summarizing the work performed to which the charges apply, for all of the zinc concentrates stockpiled between June, 1942, and November, 1946, when the purchase of zinc concentrates for stockpiling for Metals Reserve Company ceased.” Now, have you ever—

The Court: —In view of that question I will admit Exhibit No. 36 with the explanation added. I will say in admitting this exhibit that I admit it subject to the objection. I think you gentlemen understand that with the mass of correspondence the Court is going to have to sort out what applies and what does not apply. There is a great deal of testimony all through this record that I feel may be incompetent as evidence but in order to determine that it is going to take a good deal of study

(Testimony of Wallace G. Wolf.)

on the part of the Court, so I will admit this exhibit now and in view of the fact that we have a great portion of the contents anyway, I will admit it subject to the objection of the defendant and if I [171] find that it is immaterial I will strike it.

Mr. Donahue: I assume, your Honor, if the Court felt that certain portions are admissible and other portions are self serving those portions will be stricken.

The Court: That is correct, and that is true in connection with this entire matter,—there are a great many reservations made throughout this entire record, of course, I would have to rule right now if we were trying this matter before a jury but in view of the fact that it is before the Court I can take some time, of course, the Court has knowledge of all of these things anyway and whether these matters were stricken or not the knowledge would still be there and necessarily I will have to sort all of this mass of correspondence and other documents later.

Mr. Donahue: That is all, Mr. Wolf.

Mr. Brown: There is no further question.

### VERNON ROEHL

Called as a witness by the plaintiff, after being first duly sworn testifies as follows:

#### Direct Examination

Q. (By Mr. Brown): Where do you reside, Mr. Roehl?

(Testimony of Vernon Roehl.)

A. Silver King, near Kellogg, Idaho. [172]

Q. By whom are you employed?

A. The Sullivan Mining Company.

Q. In what capacity?

A. Chief accountant.

Q. How long have you been employed by the Sullivan Mining Company?

A. Since 1924. The zinc plant was built in 1926 and I was in the Wallace office prior to the time that I went to the zinc plant.

Q. You are chief accountant at the Silver King Mining Company electrolytic zinc plant?

A. Yes, sir.

Q. Were you working in that capacity in the years 1942 through 1948?           A. I was.

Q. Very briefly I will ask you to state what Exhibit No. 37 is, it has been handed to you?

A. Exhibit No. 37 is a series of vouchers making payment through Bunker Hill smelter for the various unloading charges and other charges of maintaining the bins and for the bins for the stockpile of concentrates which were actually located at the Bunker Hill smelter.

Mr. Brown: I did not intend that Mr. Roehl should go into such detail, I just wanted a statement [173] as to what they were and I was going to offer them in evidence.

The Court: Let me ask one question. Is there any dispute at all about the question of the expenditure of this money in stockpiling this material?



(Testimony of Vernon Roehl.)

Mr. Donahue: I don't think so, however, I feel from my standpoint as attorney for the Reconstruction Finance Corporation and I do not intend to take much time, but if the invoices or vouchers as such are here I would prefer to have them admitted in evidence. I do not care to go into these fully but I do prefer that they be in evidence.

Mr. Brown: There is one matter that I think should be explained by this witness or I can do it for Mr. Roehl if the Court would prefer.

Mr. Donahue: I certainly do not have any objection to Mr. Brown's explaining it.

Mr. Brown: The statement rendered and attached to these voucher checks include each month from the Bunker Hill to the Sullivan Mining Company charges other than the particular charges that relate to the unloading and stockpiling of the zinc concentrates. It might have covered a number of items in any given month and items that had nothing to do with the stockpile, there was no allocation of the cost. They were itemized but there are [174] various other charges from the Bunker Hill to them and there was no allocation and there is no allocation on these exhibits, of the costs between the stockpiling done by the Sullivan Mining Company on its own account and on the account of the Government.

The Court: I see.

Q. Mr. Roehl, you have been handed Exhibit No. 38, 39 and 40. I will ask you to state briefly what those are.

(Testimony of Vernon Roehl.)

A. Exhibit 38, 39 and 40 are exhibits which consist of invoices issued by the various vendors to the Sullivan Mining Company for lumber used in stockpiling.

Q. For the construction of bins?

A. Yes, the construction of bins and the maintenance.

Mr. Brown: I offer these in evidence.

Mr. Donahue: These are lumber invoices?

Mr. Brown: Yes, sir.

Mr. Donahue: We have no objection.

The Court: They may be admitted.

Q. Mr. Roehl, you have Exhibit No. 28, can you examine the last document on that exhibit which is a breakdown of the cost and explain that?

A. The last document is a transposition on the costs taken from the Sullivan Mining Company records under my supervision and shows the breakdown of those costs which relate to the placing of the zinc concentrates into the stockpiling storage bins for the period of June, [175] 1942, through November, 1946.

Q. Were the items of lumber costs, unloading costs and labor costs and all costs that are in there made up from the vouchers, Exhibit No. 38, 39 and 40?

A. They were.

Mr. Brown: That is all.

#### Cross Examination

Mr. Brown: Before you start, Mr. Donahue, it

(Testimony of Vernon Roehl.)

was called to my attention that on my last question I omitted Exhibit 37. I presume these records or rather this exhibit was made up from the four exhibits, 37, 38, 39 and 40?            A. Yes.

Q. (By Mr. Donahue): I am just taking the first voucher at random from Exhibit No. 37, "Sullivan Mining Company pay to the order of Bunker Hill smelter, Kellogg, Idaho, your statement of July 11, 1942", do you have supporting invoices?

A. Supporting statement was issued by the smelter.

Q. There are invoices attached?

A. Invoices for supplies.

Q. You have "4 barrels caustic soda——

A. ——Those have no relation to this. [176]

Q. 52 pounds of rivets, 2 drums sairset, 5 drums caustic soda. There are other items and then there is "your portion of custom officers' salary and the last one charged for crane, handling Star zinc concentrate, this item is \$662.96. Am I correct in stating that you have taken these invoices in making up this claim against the Sullivan Mining Company for the crane and train services, lumber costs, and so forth, that you went over them and took out from the whole invoice, the items that apply in this situation?            A. That is right.

Mr. Donahue: I believe that is all.

Mr. Brown: That is all. I think at this time, if the Court please, that if we may have a short recess it may be that we will finish with this witness and that will be our case.

The Court: I will be happy to grant you a recess. We will be in recess for a few minutes.

Mr. Brown: May I proceed now?

The Court: Yes, go ahead.

Mr. Brown: At this time, if your Honor please, the plaintiff rests.

Mr. Donahue: At this time, the plaintiff in the case having rested, for the purpose of the record I want to ask that the Court direct a judgment in favor [177] of the defendant upon the grounds that the plaintiff has wholly failed to prove the allegations of its complaint, particularly, the plaintiff having the burden of proof in this case has failed to prove more particularly paragraph six and paragraph eight of their or rather of its complaint. I feel that the evidence in this case indicates clearly that it is based upon a contract. One contract as entered into in June, 1942, that contract was amended in July of 1944 and subsequently there was an assignment by the defendant, Reconstruction Finance Corporation, of all of its liability under this contract, to the Bureau of Federal Supply, Treasury Department. That assignment was agreed to by the plaintiff in the action and the assignment was made in conformity with the strategic and critical stockpiling Act or Public Law 520, 79th Congress, approved July 23, 1946. The assignment was brought about by specific statute passed by Congress. The assignment not only had to be made because of the statute but the assignment has been agreed to and the plaintiff has at all times

acted under the assignment. That certainly knocks out the second portion of their prayer for damages or relief in the sum of \$40,268.71 and as far as the prayer for relief for the sum of \$14,595.39, which was based upon the inbound cost [178] of stockpiling previous to the assignment or previous to December 30, 1948. If they have any claim at all against Reconstruction Finance Corporation on that, it has to be by virtue of this agreement. The first agreement emphatically says "We will do this stockpiling at no cost"——

The Court: ——I think you will appreciate the fact as well as I, I don't know what else can be added at this time, it seems to me that the evidence for both sides is clearly before the Court——

Mr. Donahue: ——I agree thoroughly with the Court.

The Court: From all of the testimony that has been introduced here, as the plaintiff's case progressed, the defendant's case progressed right along with it. If I were to decide this motion at this time it would practically be a final decision of the case. I suppose that the proper method would be that I should rule before you proceed farther,—I do not know whether you have anything else to offer here.

Mr. Donahue: In order that the Court may be clear on this matter I will say that the only witness that I have was a witness and is a witness from Washington that was brought here for the purpose of identifying some of the records and documents,



and as they have been introduced now I see no reason for using my only witness. [179]

The Court: It would be perhaps an unusual procedure but if I could take this motion under advisement with the understanding that if the motion was not granted your case was rested,—

Mr. Donahue: That is agreeable, your Honor, and it can be put in the record.

The Court: Then if you rest I will have the matter entirely before me and I will have a record that is complete.

Mr. Donahue: I will state to the Court in view of your Honor's observations and remarks that the defendant Reconstruction Finance Corporation will be considered as having rested at the time your Honor makes his decision on the motion.

(Further remarks of Court and counsel, reported but not transcribed, concerning time for filing briefs, and so forth.)

The Court: It is understood now the record may show that both sides have rested.

Mr. Brown: That is right.

Mr. Donahue: Yes, the defendant has nothing further.

The Court: Then the record may show the matter is taken under advisement awaiting the filing of briefs by counsel. [180]

[Endorsed]: No. 14755. United States Court of Appeals for the Ninth Circuit. Reconstruction Finance Corporation, a corporation, Appellant, vs. Sullivan Mining Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Northern Division.

Filed: May 4, 1955.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

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In the United States Court of Appeals  
for the Ninth Circuit

No. 14755

SULLIVAN MINING COMPANY, a corporation,  
Appellee,

vs.

RECONSTRUCTION FINANCE CORPORA-  
TION, a corporation, Appellant.

REQUEST FOR PRINTING OF RECORD AND  
STATEMENT OF POINTS

I.

Appellant deems consideration by the Appellate Court of the entire record certified to this Court by the Clerk of the District Court necessary on this appeal to a proper understanding of the questions presented excepting and omitting therefrom the following:

- (a) Plaintiff's Exhibit No. 1.
- (b) Plaintiff's Exhibit No. 2.
- (c) All of Plaintiff's Exhibit No. 4, except the first two pages thereof.
- (d) The first two pages of Plaintiff's Exhibit No. 13.
- (e) Plaintiff's Exhibit No. 15.
- (f) Plaintiff's Exhibit No. 19.
- (g) Plaintiff's Exhibit No. 26.
- (h) Plaintiff's Exhibit No. 27.
- (i) Plaintiff's Exhibit No. 37.
- (j) Plaintiff's Exhibit No. 38.
- (k) Plaintiff's Exhibit No. 39.
- (l) Plaintiff's Exhibit No. 40.
- (m) Defendant's Exhibit No. 36.

and Appellant hereby requests that the same be printed with the deletions above outlined unless the Court should grant Appellant's Motion heretofore made to the Appellate Court that the Exhibits be considered in their original form without reproduction.

## II.

Appellant hereby designates for consideration on this appeal the following points on which it intends to rely:

(1) The Trial Court erred in disregarding the plain language of that portion of the original letter agreement (Plaintiff's Exhibit No. 3) which provided that the Plaintiff, Sullivan Mining Company, would stockpile at its own expense, all materials purchased under the agreement.

(2) The Trial Court erred in completely disre-

garding the storage and ownership certificate in the form of Exhibit "A" attached to the original letter agreement (Plaintiff's Exhibit No. 3) which provides that the zinc concentrates stockpiled by Plaintiff "are owned by the Metals Reserve Company or the holder thereof and will be released and delivered by the holder hereof upon the surrender of the certificate properly endorsed".

(3) The Trial Court erred in its interpretation of that part of the amended letter agreement dated July 12, 1944 (Plaintiff's Exhibit No. 6) which reads as follows:

"If this Company (Metals Reserve Company) should for any reason remove material from stockpile for any purpose other than for sale to you (Sullivan Mining Company), you will be reimbursed for actual out-of-pocket expense incurred in connection therewith upon receipt from you of your signed statement reflecting the nature of each item of expense or cost and summarizing the work performed to which the charges apply (i.e. the tonnage removed, weighed and handled)".

in that the Court found that the words "actual out-of-pocket expense incurred in connection therewith" referred not only to the cost of removal of the concentrates shipped elsewhere but also to the cost of establishing and maintaining the stockpile from the inception of the original letter agreement (Plaintiff's Exhibit No. 3).

(4) The Trial Court erred in not finding as a matter of law, that the Defendant, Reconstruction

Finance Corporation was relieved of all liability to the Plaintiff with reference to the original stockpiling agreement (Plaintiff's Exhibit No. 3) and amendments thereto, subsequent to November 30, 1948, by virtue of assignment of the contract to the Bureau of Federal Supply (Treasury Department) dated November 30, 1948 (Plaintiff's Exhibit No. 22) and it was error even if any liability did exist under the original contract or amendments thereto to enter judgment in any sum against the Defendant, Reconstruction Finance Corporation in excess of \$14,595.39, for the reason that the assignment (Plaintiff's Exhibit No. 22) and the approval and acceptance of the assignment by the Plaintiff, Sullivan Mining Company, (Defendant's Exhibit No. 35) fully relieved the Defendant, Reconstruction Finance Corporation, from any and all liability to Plaintiff, Sullivan Mining Company, for concentrates removed from the stockpile after November 30, 1948.

(5) The Court erred in making and entering Finding of Fact No. V, as follows:

"It was the understanding of both parties to said contract that in consideration of the Plaintiff's stockpiling said concentrates at its own expense it was to have the right to re-purchase said concentrates and to process and market the same and thus derive a profit as it would in the case of its usual custom smelting operations".

because there is no evidence in the record that the Plaintiff, Sullivan Mining Company, was to have



the legal right to re-purchase the concentrates and process and market the same and thus derive the profit as it would in the case of its usual custom smelting operations.

(6) The Court erred in making and entering Finding of Fact No. IX, as follows:

“It was the plaintiff’s understanding and was also the understanding and the intent of the Government at the time said amendment of July 12, 1944 was drafted by the Government and approved by the plaintiff that the plaintiff was to bear the expense of stock-piling all concentrates which should thereafter be processed by the plaintiff but that the plaintiff was to be reimbursed by the Government for all expenses incurred by the plaintiff in stockpiling any and all concentrates which might be removed by the Government and shipped to other smelters for treatment”.

because there is no evidence in the record to support the same.

(7) The Court erred in making and entering that part of Finding of Fact No. XVII which reads as follows:

“The plaintiff offered to purchase these remaining stockpile concentrates but its offer was not accepted”

because such Finding is against the clear weight of the evidence.

(8) The Trial Court erred in completely disregarding the provisions of the contract (Plaintiff’s Exhibit No. 3) and the amendment thereto (Plain-

tiff's Exhibit No. 6) and basing its decision upon the pure assumption that the stockpiling of the concentrates was solely for the benefit of Reconstruction Finance Corporation (Memorandum Opinion Tr. pp. 16-18) instead of recognizing that the stockpiling agreement under the contract was also for the benefit of Sullivan Mining Company.

(9) The evidence introduced by Plaintiff is entirely insufficient to support the verdict and the Defendant's Motion for a Directed Verdict in its favor should have been granted.

(10) The Complaint alleges a specific agreement for reimbursement for the cost of stockpiling. The clear weight of the evidence indicates that there was no such agreement and the Trial Court, by its decision, has attempted to write a new agreement for the parties.

(11) The Trial Court erred in admitting in evidence, over Defendant's objection, Plaintiff's Exhibit No. 21 (RPT 69) for the reason that said Exhibit is a Contract sent to Sullivan Mining Company by the Bureau of Federal Supply (Treasury Department) which said Bureau of Federal Supply has not been made a party to the action and for the further reason that said Contract (Exhibit No. 21) was never executed and, therefore, became incompetent as to any issue involved in the litigation.

(12) That the Trial Court erred in admitting in evidence, over Defendant's objection, Plaintiff's Exhibit No. 23 (RPT 76); Plaintiff's Exhibit No. 24 (RPT 80); Plaintiff's Exhibit No. 25 (RPT 84-87); Plaintiff's Exhibit No. 28 (RPT 97); and

Plaintiff's Exhibit No. 29 (RPT 99-100) for the reasons that all of said Exhibits consist of correspondence between Plaintiff, Sullivan Mining Company, and the Bureau of Federal Supply (Treasury Department) and become hearsay and otherwise irrelevant, incompetent and immaterial because the Bureau of Federal Supply (Treasury Department) is not a Party Defendant to this action and also because the Defendant, Reconstruction Finance Corporation, by virtue of Assignment dated November 30, 1948 (Plaintiff's Exhibit No. 22), ceased to have any rights, powers, privileges, duties or obligations under the original Contract (Plaintiff's Exhibit No. 3), and amendments thereto.

/s/ L. VINCENT DONAHUE,

/s/ STIMSON & DONAHUE,

/s/ TOM B. PAINE,

Attorneys for Defendant and  
Appellant

[Endorsed]: Filed April 22, 1955. Paul P. O'Brien, Clerk.

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[Title of U. S. Court of Appeals and Cause.]

### STIPULATION

It Is Hereby Stipulated and Agreed between the attorneys for Appellee and Appellant in the above entitled action that with the approval of the United States Circuit Court of Appeals for the Ninth Circuit, that the Appellate Court may be relieved from

printing and reproducing the exhibits transmitted to the Appellate Court from the United States District Court for the District of Idaho, Northern Division, and that said exhibits in said cause, being Exhibits 1 to 40 inclusive, except No. 34 which was not offered in evidence, may be considered in their original form without reproduction into the printed record to be prepared by the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 16th day of April, 1955.

/s/ CHAS. E. HORNING,

/s/ ROBERT E. BROWN,

Attorneys for Appellee

/s/ L. VINCENT DONAHUE,

Attorney for Appellant

[Endorsed]: Filed April 22, 1955. Paul P. O'Brien, Clerk.

